IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION

and

POLK TANKER CORPORATION,
Petitioners,

v.

SHELL OIL COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Seatrain Shipbuilding Corporation and Polk Tanker Corporation pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered February 6, 1979, reversing the summary judgment granted petitioners by the United States District Court for the District of Columbia and remanding for the entry of an order granting respondents the relief requested.

OPINIONS BELOW

The opinion of the court of appeals is unreported and set forth in Appendix A at 1a-61a. The opinion of the district court is reported at 445 F. Supp. 1128 (D.D.C. 1978) and set forth in Appendix A at 65a-95a.

JURISDICTION

The Court of Appeals entered judgment on February 6, 1979 and denied a timely petition for rehearing on March 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the broad contracting authority of the Secretary of Commerce under the Merchant Marine Act, 1936, includes the power to amend a construction differential subsidy contract to remove domestic trade restrictions in consideration for full subsidy repayment, where the existence of such power is supported by the legislative and administrative history of the Act and furthers the Act's fundamental policy goals.

STATUTORY PROVISIONS INVOLVED

The relevant sections of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1101, *et seq.*, are set forth in Appendix B.

STATEMENT OF THE CASE

The T.T. STUYVESANT is a 225,000 deadweight ton oil tanker constructed by Seatrain Shipbuilding Corporation ("Seatrain") for Polk Tanker Corporation ("Polk") between 1972 and 1977. The vessel was constructed with the assistance of a $27.2 million construction differential subsidy ("CDS") from the federal government. In contracting for the CDS, Seatrain and Polk agreed to limit the vessel's operation in the domestic trades in accordance with Title V of the Merchant Marine Act, 1936, as amended, 46 U.S.C. §§ 1101 *et seq.* ("the Act").

On August 31, 1977, the Assistant Secretary of Commerce for Maritime Affairs and the Maritime Subsidy Board took a series of actions that enabled the STUYVESANT to engage in the transportation of Alaskan oil. Those actions included a decision to accept a full repayment of the $27.2 million CDS and, in exchange, to delete from the contract the domestic trade restrictions. The three respondent companies filed suit for declaratory and injunctive relief, contending *inter alia* that the Act does not authorize the removal of trade restrictions in consideration for subsidy repayment. The district court's decision that the Act empowered the federal officials to take the challenged actions was reversed by a divided panel of the court of appeals.

1. Statutory Framework

The Merchant Marine Act, 1936 was designed to "foster the development and encourage the maintenance" of an efficient U.S.-built, owned, manned and serviced merchant marine capable of meeting the nation's defensive and commercial needs in the do-

mestic and foreign trades. (Section 101 of the Act, 46 U.S.C. § 1101.) The Act vests in the Secretary of Commerce commensurate responsibility and authority to administer the nation's maritime functions; she is broadly charged to keep current on the entire industry and "to study all maritime problems arising in the carrying out of the policy set forth in Title I of the Act." (Sections 210-212 of the Act, 46 U.S.C. §§ 1120-1122.) The Secretary is empowered to "enter into such contracts . . . as may, in [her] discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the [Department of Commerce] to secure indebtedness . . . ." (Section 207 of the Act, 46 U.S.C. § 1117.)

The construction differential subsidy program, codified in Title V of the Act, 46 U.S.C. §§ 1151-1161, was designed to stimulate domestic shipbuilding and to increase the number of American-owned vessels. Although the requirements of the Jones Act, 46 U.S.C. § 883, assured that vessels operating in the U.S. domestic trades would be built here and owned by U.S. citizens, no similar provision governs ships operating in the U.S. foreign trades. Because the cost of building ships in this country is and has historically been higher than that of building them abroad, simple economics would dictate the use of foreign shipyards for ships intended for the foreign trades in the absence of some equalizer. Congress supplied that equalizer in Title V; the CDS program

authorizes the Secretary to subsidize the construction of vessels intended for the foreign trade by paying the approximate difference between the cost of domestic and foreign construction.

The Secretary of Commerce and her delegees (hereinafter "the Secretary") have full authority over the administration of the CDS program. Section 501, 46 U.S.C. § 1151, provides that CDS applications be submitted to the Secretary who is afforded broad discretion to determine subsidy eligibility. Sections 502 and 504, 46 U.S.C. §§ 1152 and 1154, provide the basic CDS contracting authority; that authority is expansive in accordance with the Act's multiple policy goals. Section 503, 46 U.S.C. §§ 1153, provides that CDS-built vessels shall be documented under the U.S. flag throughout their useful lives and § 505, 46 U.S.C. § 1555, requires that subsidized vessels be constructed in U.S. shipyards with domestic materials. Finally, as relevant to this proceeding, § 506, 46 U.S.C. § 1156, provides that owners of vessels for which CDS has been paid "shall agree" to limit the operation of their vessels to the foreign trade. Section 506 also provides that the Secretary may, when she determines it "necessary or appropriate to carry out the purposes of this Act," permit a CDS vessel to operate temporarily in the domestic trades for up to six months in any year in exchange for a partial, proportionate CDS repayment.

Title XI provides an additional method by which the federal government may assist the financing of

shipbuilding in the country. Obviating the need for a ship owner to use his own credit to raise construction capital, this title authorizes the agency to provide substantial loan guarantees to finance both initial construction costs of a vessel and a full or partial CDS repayment.

2. Statement of Facts

In 1969, Seatrain commenced construction of a series of supertankers at the shipbuilding facilities of the former Brooklyn Navy Yard. Seatrain's adaptation of those facilities and institution of a program to train and employ hard-core unemployeds from the Bedford-Stuyvesant section of Brooklyn attracted substantial economic assistance from the Economic Development Administration of the Department of Commerce ("EDA"), including loans of $5 million and 90% guarantees of $82 million in loans to Seatrain.

The third vessel in the construction program, the T.T. STUYVESANT, was constructed between 1972 and 1977. Its construction was initially assisted by loan guarantees of $30.2 million pursuant to Title XI of the Act and a $27.2 million construction differential subsidy paid pursuant to Title V of the Act. As required by § 506, the STUYVESANT's CDS contract contained terms restricting the vessel's operation in the domestic trade.

Trade conditions changed dramatically during the six years that the STUYVESANT was under construction. The 1973 Middle East conflict, the Arab oil embargo and ensuing worldwide economic problems converged to decrease drastically the demand for supertankers in the foreign trades. By 1977, the foreign tanker market that the STUYVESANT had been constructed to serve offered no prospect for its employment. However, at the same time, the domestic transportation of Alaskan oil—reserved to U.S.-built, owned and operated vessels by the Jones Act—was a thriving and undertonnaged tanker trade that sought the STUYVESANT's service. In mid-1977, Polk secured an attractive opportunity to charter the STUYVESANT for three years to Standard Oil Company of Ohio ("SOHIO") to carry oil between Alaska and Panama and, as a result of the charter, to sell the vessel. The charter and sale were premised upon the vessel's ability to obtain release from the domestic trade restrictions in its CDS contract.

On August 25, 1977, Polk applied for permission to repay the $27.2 million subsidy in exchange for the permanent release of domestic trade restrictions on the STUYVESANT. The Maritime Subsidy Board and the Assistant Secretary of Maritime Affairs approved Polk's request on August 30, 1977 on the grounds that the STUYVESANT had no other opportunity for employment, the approval of the CDS repayment and SOHIO charter would improve the government's collateral position and prevent default on the various obligations insured and guaranteed by the Department of Commerce, and the failure to

approve the proposal would jeopardize the continued operation of the Seatrain shipyard.

A closing of the various financial transactions surrounding the repayment, sale and charter of the STUYVESANT was scheduled for September 23, 1977. On September 22, 1977, the respondents filed suits against the Department of Commerce officials, seeking temporary and permanent injunctive relief from their decisions concerning the STUYVESANT.[1] Polk and Seatrain were permitted to intervene as defendants.

A temporary restraining order was granted and subsequently dissolved when the court denied preliminary injunctive relief. The transactions closed on September 30.[2] As a result of these transactions,

[1] Alaska Bulk Carriers, Inc. and Trinidad Corporation filed an action against the Secretary of Commerce Juanita M. Kreps, Assistant Secretary of Commerce Robert J. Blackwell, the Maritime Administration and the Maritime Subsidy Board. In addition to Secretary Kreps and Assistant Secretary Blackwell, Shell Oil Company sued Howard F. Casey, then Deputy Assistant Secretary of Commerce, and Samuel B. Nemirow, then General Counsel to the Maritime Administration.

[2] At that time, the STUYVESANT was transferred to United States Trust Company ("USTC") as owner-trustee for the new equity owner, General Electric Credit Corporation ("GECC"). The Secretary amended the STUYVESANT's CDS contract to delete the restrictions on the vessel's domestic trading, and Polk issued a fully collateralized promissory note to the Secretary for $27,200,000 in repayment of the full amount of the CDS. The note was assumed

(1) the Department of Commerce received a fully collateralized $27.2 million note and was released from $28 million of loan guarantees, (2) the STUYVESANT, which supports over $60 million of government-insured indebtedness, is profitably employed rather than standing idle in lay-up, and (3) a critical shortage of tonnage for the transportation of Alaskan oil was alleviated. The STUYVESANT has been transporting oil from Alaska to Panama for SOHIO since that time.

After cross motions for summary judgment were filed, the district court held that the Secretary's broad contractual powers under the Act include the authority to remove permanently trade restrictions on a CDS-built vessel in exchange for CDS repayment. The court rejected respondents' argument that § 506 implicitly bars the permanent removal of domestic trade restrictions and reasoned that an absolute prohibition of such action "precludes any and all administrative flexibility and thereby at least potentially obstructs

by USTC which also assumed responsibility for $60,200,000 of government-insured indebtedness on the vessel, $31,355,000 of which is indebtedness incurred at the closing through the sale of bonds. The proceeds received from the sale of the bonds were used to repay loans of $28,000,000 guaranteed by the EDA. USTC also paid Polk $32,600,000 in cash; these funds were placed in an interest-bearing certificate of deposit account and secure a guarantee to GECC provided by Seatrain Lines, Inc., the parent corporation of Seatrain and Polk. USTC then bareboat-chartered the vessel to Queensway Tankers which in turn time chartered it to SOHIO for three years.

the Secretary's ability to effectuate the broad statutory goals set forth [in Title I of the Act]." (App. A at 78a.) A divided panel of the court of appeals disagreed and reversed. Interpreting the Act to earmark permanently subsidized and unsubsidized vessels for "two completely separate competitive areas" (App. A at 50a), the panel majority concluded that the Secretary's action is unauthorized by the Act, implicitly prohibited by § 506, and contrary to the Act's overall purposes.

REASONS FOR GRANTING PETITION

This case presents an important issue of federal law in a unique posture. No court other than the lower courts in this case have ruled on the issue here. The four judges who have considered the case have split evenly on the fundamental question of the Secretary's statutory authority. Regardless of its merit, the disposition of the case by the court of appeals will prevent the Secretary from granting any permanent release of trade restrictions in the future. Thus there will never be another opportunity for this Court or any other court to review the issue presented by this case. The importance of the issue to the federal maritime program, the staggering economic consequences to the commercial transactions entered into on the basis of the Secretary's action, the panel majority's crabbed and erroneous interpretation of the Secretary's authority under the Act, and the blatant anti-competitive effect of the decision below combine to warrant review by this Court.

1. The decision of the court of appeals overturns a longstanding agency interpretation and carries serious adverse implications, both short and long term, for the Department of Commerce and the nation's maritime industry.

The immediate impact of the decision below is the disqualification of the STUYVESANT from long term, continuous employment in the nation's domestic trades. That disqualification threatens enormous financial loss to the United States treasury and the parties to the charter and sale transaction. It deprives the federal government of a $27 million subsidy repayment, jeopardizes $60 million of loans and guarantees extended by the Department of Commerce and secured by the STUYVESANT, threatens Seatrain Lines, Inc. with an obligation to perform on its $30 million guarantee to GECC, and potentially relegates a $100 million American-built, owned and crewed supertanker to lay-up and foreclosure.

The more general consequence of the decision is to cripple the Secretary's ability to oversee and permit deployment of the American fleet in the best interests of the industry and the public. It denies her the discretion and flexibility necessary to respond effectively to the exigencies of changing conditions and markets in the maritime world, and thus to effectuate the fundamental and explicit purposes of the Act. This result presents a windfall to the unsubsidized fleet by permanently insulating it from fair competition with vessels that once received but have remitted their

subsidy. The decision skews the Act to benefit one segment of the American merchant marine at the expense of the rest of the industry, and thus substantially undermines the balance of interests that Congress achieved in the Act itself.

2. In reversing the district court and declaring the Secretary's actions beyond her statutory authority, the panel majority concluded that the permanent removal of domestic trade restrictions on a CDS-built vessel is not authorized by any provision of the Act, is implicitly precluded by § 506, and is contrary to the overall purposes of the Act. The majority makes three basic mistakes: (a) the Act amply empowers the Secretary to take the action challenged here; (b) § 506 does not bar the permanent removal of trade restrictions; and (c) the action is fully supportive of and consistent with the congressional policy expressed both in the legislative history and the structure of the Act, including § 506 itself.

a. *The Secretary's Authority*

No provision of the Act authorizes *in haec verba* the Secretary to delete from a CDS contract the terms restricting domestic trading by a vessel constructed with CDS assistance in consideration for full CDS repayment. That omission, however, does not deny the Secretary the amendatory authority where such a power is included in the broader authority afforded by the Act. The decisions of the district court and the dissent below recognize that the expansive con-

tractual powers of the Secretary under the Act provide ample authority for the Secretary's decision concerning the STUYVESANT.

The Act entrusts to the Secretary the formidable obligation to effectuate the policy goals set forth in Title I. That title declares a national policy of bolstering domestic shipyards, and fortifying and increasing the number and competitive abilities of Jones Act vessels in both the domestic and foreign trades.

The discretionary powers afforded the Secretary under the Act are as broad as the duties imposed upon her. Section 207 flatly empowers the Secretary to "enter into such contracts, upon behalf of the United States, . . . as may, in [her] discretion, be necessary to carry on the activities authorized by [the] Act, or to protect, preserve or improve the collateral held by the [government] to secure indebtedness . . . ." (App. B at 99a.) Section 504 places within the Secretary's power the full authority to make CDS contracts (App. B at 122a), and this section has been interpreted, correctly we submit, in reorganization plans to include the related authority to amend and terminate such contracts.[3] (*See* App. B at 107a, 112a-113a.) The Secretary's CDS contracting authority is qualified only by the requirement of §§ 501(a) and 504 that CDS contracts "shall not restrict the lawful or proper

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[3] Reorganization Plan No. 21 of 1950, § 105(1), 64 Stat. 1273. *See also* Reorganization Plan No. 7 of 1961, § 202(b)(1), 75 Stat. 840.

use or operation of the vessel, except to the extent *expressly* required by law." (Emphasis added.) (App. B at 113a-114a, 122a.)

These contractual powers embrace the ability to amend a CDS contract to delete domestic trade restrictions in consideration for subsidy repayment, unless the existence of such authority is otherwise expressly denied by the Act or inconsistent with its overall purposes and policies. All opinions issued below agree that the Act contains no provision that expressly prohibits the permanent release of trade restrictions. The decision of the panel majority turned instead upon its erroneous reading of § 506 as an implicit bar to such authority and its misperception of the Act's fundamental purposes.

b. *Section 506 of the Act*

The panel majority concluded that § 506 implicitly prohibits the permanent removal of domestic trade restrictions on a CDS-built vessel. An examination of the provision, its legislative history, and administrative interpretation demonstrates the error of this conclusion.

Section 506 requires a vessel owner to agree to operate the vessel in the foreign trades as the *quid pro quo* for CDS payment. That agreement is not absolute. Rather § 506 expressly contemplates that a CDS vessel may spend six months of every year, and thus half its economic life, in direct competition with unsubsidized vessels in the domestic trades. The

opportunity for such temporary domestic trading is conditioned upon (1) the owner's remittance of a proportionate amount of its subsidy, and (2) the Secretary's determination that the temporary transfer is "necessary or appropriate to carry out the purposes of [the] Act." (App. B at 122a-123a.)

The language of § 506 establishes only the restrictions that attach to a vessel that has received and still retains the financial benefits of the subsidy. The provision does not address, and thus imposes no restriction on, the trading opportunities of a vessel that once received but has remitted in full a subsidy. The logic of the statutory provision does suggest, however, that any trade restrictions that attach as a condition of the subsidy's receipt should be removed in consideration for its full repayment, if the Secretary finds that such action would further the purposes of the Act.

An analysis of the Act's legislative history plainly establishes that result as the intention of the framers of the Act. Indeed, multiple bills proposed prior to the Act's passage,[4] statements in the relevant Con-

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[4] *See, e.g.*, H.R. 7521, 74th Cong., 1st Sess. § 504 (1935) (introduced by Judge Bland, Chairman of House Committee on Merchant Marine and Fisheries); S. 2582, 74th Cong., 1st Sess. § 504 (1935) (introduced by Senator Copeland, Chairman of Senate Commerce Committee); S. 4110, 74th Cong., 2d Sess. § 27 (introduced by Senator Guffey); S. 3500, 74th Cong., 2d Sess. § 506(b) (introduced by Senator Copeland as Committee Print of March 3, 1936).

gressional reports,[5] the comments of the Act's pioneers, including Senators Black, Copeland and Guffey,[6] and the original language of § 506[7] all expressly contemplated and approved the permanent release of the trade restrictions upon full subsidy repayment.

Although the panel majority grudgingly recognized the demonstrable intent of the enacting Congress, it concluded that a 1938 amendment to § 506[8] dispelled the authority to release permanently domestic trade restrictions. The incorrect observation rests exclusively on the unexplained deletion of the language describing the Secretary's permanent waiver authority during the course of the 1938 amendment and contradicts the legislative history and the contemporaneous industry understanding. The legislative history firmly

[5] *See* H.R. Rep. 1277, 74th Cong., 1st Sess. 22 (1935).

[6] *See, e.g.*, S. Rep. 898, 74th Cong., 1st Sess. 44 (1935); Proposed Merchant Marine Act, 1936: Hearings on S. 3500, S. 4110 and S. 4111 Before the Senate Committee on Commerce, 74th Cong., 2d Sess. 124, 133 (1936).

[7] Section 506 as enacted in 1936 stated in relevant part: "It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in the foreign trade . . . . unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid . . . as the remaining economic life bears to its entire economic life." Act of June 24, 1936, c. 858, § 506, 49 Stat. 1999.

[8] Act of June 23, 1938, § 18, 52 Stat. 958.

establishes that the purpose of the 1938 amendment to § 506 was to clarify the requirement of a proportionate subsidy repayment in cases of temporary domestic trading by CDS vessels.[9] The dissent correctly notes that "nowhere in the legislative history is there any indication that permanent waivers, apparently permissible under the 1936 Act, were expressly considered and eliminated in 1938." (App. A at 55a.) Moreover, Congress specifically stated that the 1938 amendment effected "[n]o fundamental change in the original purpose of the section,"[10] a purpose that plainly included permanent trade restriction release. Finally, the legislative history demonstrates that the unsubsidized operators did not share the panel majority's view of the effect of the amendment. Indeed, their representatives testified against the amendment on the grounds that it expanded the ability of CDS vessels to compete in the domestic trades and urged upon Congress the result that the amendment did not offer them—the permanent bar of a vessel built with CDS assistance from the domestic trades.[11]

The agency has consistently interpreted the Act to authorize the release of domestic trade restrictions

[9] *See, e.g.*, H.R. Rep. 2168, 75th Cong., 3d Sess. 21 (1938).

[10] *Id.*

[11] Amending the Merchant Marine Act, 1936: Hearings on S. 3078 Before the Senate Committees on Commerce and Education and Labor, Part I, 75th Cong., 2d Sess. 44 (1937).

upon full CDS repayment. It first exercised the authority in 1964 in response to a request by Grace Line that the agency amend CDS contracts on two of its vessels to delete the domestic trade restrictions in exchange for full CDS repayment. At that time, the agency decided and the Comptroller General agreed [12] that no provision of the Act, including § 506, prohibited the exercise of that authority. Although the panel majority distinguishes the facts and quarrels with the reasoning of the Grace Line decision, the opinion quite plainly evidences the agency's considered view of its powers under the Act. That interpretation has been consistently, albeit sparingly, reaffirmed by the agency in the intervening years and, rather than attempting to curb the authority, Congress has knowingly approved the interpretation and promoted the exercise of the Secretary's permanent waiver authority.

Six years after *Grace Line*, Congress amended the Act including Title V in some detail, leaving intact the agency's 1964 interpretation of its Title V powers.[13] Two years later, in its 1972 amendments to Title XI of the Act, Congress specifically considered and indeed facilitated the exercise of the permanent release authority. Among the amendments adopted to improve the Act's responsiveness to the

[12] Comptroller General Decision B-155039, 44 Comp. Gen. 180 (1964).

[13] *See* P.L. 91-469, 84 Stat. 1018 (1970).

financing needs of the industry was § 1104(a)(3), 46 U.S.C. § 1274(a)(3). (App. B at 123a-124a.) Section 1104(a)(3) extends to the Secretary the authority to guarantee private obligations that aid in "financing, in whole or in part, the repayment of any amount of construction-differential subsidy . . ." As originally proposed, the section explicitly embraced full CDS repayments made to obtain the permanent release of trade restrictions.[14] In order to extend the financing guarantees to both full CDS repayment for trade restriction release and partial CDS repayment for § 506 temporary and incidental trade, Congress deleted the qualifying language that referred specifically to the permanent removal of trade restrictions. However, as the dissent recognizes, Congress' explanation of the amendment establishes unequivocally its knowledge and approval of the *Grace Line* authority. (*See* App. A at 57a-58a.)

The agency's interpretation in *Grace Line* and Congress' subsequent affirmation of its authority mer-

[14] As originally introduced, the bill provided for

> ". . . financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to Title V of this Act, as amended, in order to release such vessel from all restrictions imposed as a result of the payment of construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions." H.R. 9756, 92d Cong., 1st Sess. § 3 (1971).

ited the deference afforded them by the district court and the dissent below.

> "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation." *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 380-382 (1969). (Footnotes deleted.)

See NLRB v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). The agency interpretation must be affirmed unless it is unreasonable, *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965), or there are "compelling indications" that it is incorrect. *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977).

c. *The Purposes and Policies of the Act*

The decision of the panel majority proceeds from its fundamental belief that the unsubsidized owner needs, is entitled by statute to receive, and has relied upon freedom from any competition with CDS-built vessels. The 40-year history of the Act contradicts this anticompetitive approach. The express and overriding purposes of the Act declare a policy of fortifying and increasing the number and competitive abilities of Jones Act vessels in both the United States domestic and foreign trades. The language and legislative history of the Act, particularly that of § 506, reveal no generalized congressional intent to bar competition between the subsidized and unsubsidized fleets but instead evince a circumscribed purpose to assure that all such competition would be fair.

Congress recognized the potential for unfair competition between subsidized and unsubsidized vessels under circumstances where the retention of the subsidy could afford a material competitive advantage. To eliminate unfair competition, § 506 exacts the price of domestic trading restrictions for the subsidy benefit. The full disgorgement of the subsidy, however, eliminates any unfair advantage that a CDS-built vessel might otherwise have. Indeed, as Judge Bazelon aptly observed below:

> Full repayment of subsidy irrevocably places the transferred vessel on the same footing as all other ships in the Jones Act fleet, without affording an unfair advantage to the previously subsidized operator. The only conceivable harm to the Jones Act operators is an increase in competition from an additional U.S.-flag, U.S.-built vessel. I do not believe it is the purpose of § 506 in particular, or the Merchant Marine Act as whole, to protect Jones Act operators from this type of competition. (Footnote deleted.) (App. A at 59a.)

The panel majority misapprehends the Act and its history by reading into it a purpose never intended—the isolation of subsidized and unsubsidized vessels into two "completely separate competitive areas." (App. A at 50a.) The majority's approach confuses the protectionist purposes of the Jones Act with the distinct purposes of the Merchant Marine Act, 1936. The Jones Act reserves United States domestic trade for U.S.-built and U.S.-flag vessels. The STUYVESANT satisfies all requirements of the Jones Act. The Merchant Marine Act, 1936, established a system for subsidizing U.S.-built and operated vessels in the foreign trade with the express objective of increasing the overall strength of the national merchant marine. All of the Act's multiple purposes, including the protection of the unsubsidized owner from unfair competition,[15] were served by the Secretary's decision concerning the STUYVESANT.

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[15] At the direction of the district court on remand, the agency reconsidered its decision admitting the STUYVESANT to the domestic trade with particular focus on the competitive impact of the vessel's entry on that trade. The agency invited and received comments from interested parties, including the respondents in this case. The conclusion reached in the agency's 37-page opinion was that the competitive effect of accepting CDS repayment under the approved terms and of allowing the STUYVESANT to engage in the Alaska trade is "none or minimal." (TT STUYVESANT—Repayment of CDS, Operation in Jones Act Trade, MSB Docket A-124, Final Opinion and Order on Reconsideration, January 6, 1978.)

The STUYVESANT became available for domestic commerce while it had been unmarketable in the United States foreign trade. The STUYVESANT remains capable of responding in a military emergency. The STUYVESANT continues to be owned and operated under a United States flag by United States citizens. The STUYVESANT is a safe vessel constructed in the United States and manned by trained, efficient United States personnel. The STUYVESANT's construction and the Secretary's financial aid to the shipyard made a significant contribution to the existence of domestic facilities for shipbuilding and repair. Finally, as an added advantage of the decision, the revenues generated by the sale and charter transaction permitted the repayment of debt guaranteed by the government and protected the collateral for the government's outstanding loans and guarantees.

The purposes of the Act are not furthered, and indeed are thwarted, by the profoundly anti-competitive view advanced by the panel majority. The Act does not license the unsubsidized owner's exploiting a demand/supply imbalance in the domestic trades when an American-built, owned and operated vessel is without a market and poses no unfair competitive threat in the domestic trade. In extending such commercial privilege to the respondents, the panel majority unduly credited their dramatic claims of surprise at the Secretary's action and of reliance upon the absence of permanent competition with vessels con-

structed with CDS assistance in the Alaskan oil trade. Pursuant to the six-month transfer and incidental trade provisions of § 506 and the permanent trade restriction release option exemplified by *Grace Line*, vessels built with CDS can and do fairly compete with other Jones Act vessels in the domestic trades. The possibility of full or part time competition with CDS vessels has been widely recognized by the industry for years. Moreover, the events that swelled the demand for tankers in Alaska were as unforeseeable as those that depressed the foreign market for such vessels.

The respondents, through this action, have strived vigorously to preclude the entry of a new competitor into the important Alaskan oil trade. The efforts of the respondents here parallel the requests made of Congress by unsubsidized operators in 1938. Only the result reached by the court of appeals is different. The decision of the panel majority awards the unsubsidized Jones Act owners the permanent monopoly in the domestic trades that Congress in the past refused to sanction.

The Merchant Marine Act, 1936—as originally enacted by Congress, as interpreted by the agency, and subsequently affirmed by Congress—affords the Secretary the necessary authority to respond to the extraordinary confluence of factors that prompted and support her STUYVESANT decision. The repayment of the CDS satisfies the congressional requirement of

fairness embodied in the Act. The employment of the vessel, the safeguarding of the federal guarantees and loans, and the assistance to the shipyard respond directly to the Act's overriding and fundamental goals to foster and maintain an efficient national merchant marine. "This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred. . . . Surely the [Secretary's] broad responsibilities . . . demand a generous construction of [her] statutory authority." *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) (Citations deleted.) The decision of the panel majority undermines the equilibrium of interests established by Congress, intrudes upon the Secretary's rightful authority, and awards the respondents an unwarranted freedom from competition in the domestic trades.

CONCLUSION

For all of the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-2080

ALASKA BULK CARRIERS, INC.
TRINIDAD CORPORATION, APPELLANTS

v.

JUANITA M. KREPS, SECRETARY OF COMMERCE,
U.S. DEPARTMENT OF COMMERCE, ET AL.

(Civil Action No. 77-1647)

No. 78-1211

SHELL OIL COMPANY
(a Delaware Corporation), APPELLANT

v.

JUANITA M. KREPS
(INDIVIDUALLY AND AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE ACTING IN HER OFFICIAL CAPACITY), ET AL.

(Civil Action No. 77-1645)

No. 78-1212

ALASKA BULK CARRIERS, INC.
TRINIDAD CORPORATION

v.

JUANITA M. KREPS, SECRETARY OF COMMERCE
U.S. DEPARTMENT OF COMMERCE, ET AL.
POLK TANKER CORPORATION, ET AL., APPELLANTS

(Civil Action No. 77-1647)

No. 78-1281

SHELL OIL COMPANY
(a Delaware Corporation),

v.

JUANITA M. KREPS
(INDIVIDUALLY AND AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE ACTING IN HER OFFICIAL CAPACITY), ET AL.

SEATRAIN SHIPBUILDING CORP. AND
POLK TANKER CORP., APPELLANTS

(Civil Action No. 77-1645)

Appeals from the United States District Court
for the District of Columbia

Argued 16 October 1978

Decided 6 February 1979

Before BAZELON, MCGOWAN, and WILKEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILKEY.

Dissenting opinion filed by *Circuit Judge* BAZELON.

OUTLINE OF THE OPINION

Alaska Bulk Carriers v. *Kreps, et al.*

WILKEY, *Circuit Judge*: This is an appeal from an unsuccessful challenge in the District Court by appellant-plaintiffs to action taken collectively by the Secretary of Commerce, the Maritime Administrator, and the Maritime Subsidy Board. The Agency (to use the term inclusive of the actions and authority of all appellee-defendants) had removed statutory restrictions barring operations of the 225,000-ton tanker *Stuyvesant* in the domestic maritime trade in exchange for the repayment (by 20-year promissory notes) of the entire $27.2 million subsidy the Agency had previously paid toward construction of the *Stuyvesant*. We hold that nothing in the Merchant Marine Act of 1936 [1] permits the *permanent* removal of the statutory bar to the utilization of construction-subsidized vessels in the domestic maritime trade, and therefore reverse the decision of the District Court.

I. BACKGROUND

A. *Statutory*

It has long been recognized that the cost of building ships in U.S. shipyards, and likewise the cost of operating vessels with American crews and according to American safety standards, is considerably higher than construction in foreign shipyards or operation with foreign crews. It has also long been recognized that an adequate merchant marine is vital to both the national defense and the commercial welfare of the United States.[2] Since the earliest days of the Republic, the problem of maintaining an adequate merchant marine in the domestic trade has been solved by preferential legislation that only U.S.-

[1] Pub. L. No. 74-835, ch. 858, 49 Stat. 1985 (20 June 1936), as amended, 46 U.S.C. § 1101 *et seq.* (1970).

[2] *See Sea Land Service, Inc.* v. *Kreps*, 566 F.2d 763, 765 (D.C. Cir. 1977); Merchant Marine Act of 1936, 46 U.S.C. § 1101 (preamble); *Approval of Operating-Differential Subsidies Under Section 605(c) of the Merchant Marine Act of 1936: A New Standard for "Adequacy,"* [1978] DUKE L.J. 252.

built and U.S.-flag vessels can be operated in commerce between points in the United States.[3] The Jones Act, § 27 of the Merchant Marine Act of 1920,[4] provides that only vessels "built in and documented under the laws of the United States and owned by persons who are citizens of the United States" may engage in domestic trade, defined as trade "between points in the United States, including Districts, Territories, and Possessions thereof embraced within coastwise laws. . . ." [5] Since all ships operating in the U.S. domestic trade are both U.S.-built and owned, there has thus never been a need for a subsidy.

In U.S. foreign commerce, however, the practical competitive situation is otherwise. Every foreign nation with which the United States trades has precisely the same interests and precisely the same right to have cargo passing between the two countries carried in ships of its flag. If the construction and operating costs of the foreign-flag vessels are lower, which they are and have been for many years, then on a purely competitive basis both import and export cargo of the United States will be carried exclusively in foreign-flag vessels. To forestall this highly undesirable situation, Congress for many years has authorized both a subsidy for ships to

[3] *See* Act of 4 July 1789, ch. II § 5, 1 Stat. 24, 27 (discount on duties for goods imported in vessels owned by U.S. citizens); Act of 20 July 1789, ch. III, 1 Stat. 27 (tax on foreign vessels transporting U.S. products "coastwise" within the United States); Act of 1 March 1817, ch. XXXI, 3 Stat. 351 (direct prohibition of use of foreign vessels in domestic trade).

[4] P.L. No. 66-261, ch. 250, § 27, 41 Stat. 999 (5 June 1920), 46 U.S.C. § 8883 (1970). The term "Jones Act" is perhaps most commonly used to refer to § 33 of the Merchant Marine Act of 1920. *See* 41 Stat. 1007, 46 U.S.C. § 688 (1970). This section provides for recovery for injury to or death of a seaman. *See id.* In this opinion, however, we will use the term "Jones Act" to refer only to § 27 of the Merchant Marine Act of 1920.

[5] *See* Merchant Marine Act of 1920, *supra*, § 27, 46 U.S.C. § 883 (1970).

be built in U.S. yards and an operating-differential subsidy for the manning of American-flag vessels by American citizens in accordance with American safety standards. Under the construction-differential subsidy program,[6] which is the only subsidy at issue here, the Government may pay up to 50% of the construction costs of vessels needed for the U.S. foreign maritime trade.[7]

The U.S. merchant fleet is thus divided into two distinct segments. The "Jones Act" fleet, which operates in the protected U.S. domestic trade, cannot economically compete in foreign trade with either foreign ships or the U.S. subsidized fleet, because Jones Act ships are built and operated without subsidy and are thus far more costly to their American owners. The subsidized U.S. merchant fleet has never been allowed to compete in the domestic trade, because it would be grossly unfair to allow U.S. vessels which have received a sudsidy of up to 50% of construction costs to compete with U.S. vessels whose owners paid the full costs of construction in U.S. yards. The Jones Act preference legislation, designed to encourage construction in U.S. shipyards and the employment of U.S.-flag vessels in the domestic trade, all without direct cost to the taxpayers, would be completely negated if subsidized U.S.-flag competition were allowed to invade this protected reserve. As a consequence of such competition, American shipowners would be reluctant to build vessels without subsidy and the long-range investment decisionmaking of American shipowners and shipbuilders would be seriously upset.[8]

The appellants argue that "[u]ntil the agency actions complained of here, ships built in U.S. shipyards for the

[6] *See* 46 U.S.C. §§ 1151-61 (1970).

[7] *See* 46 U.S.C. § 1152(b) (1970).

[8] *See* Opening Brief for Appellants Alaska Bulk Carriers, Inc. and Trinidad Corp. at 6-8 [hereinafter cited as Brief for Alaska Bulk and Trinidad].

subsidized fleet were permanently barred from competing with the Jones Act fleet in the protected domestic trade."[9] Appellants point to § 506 of the Merchant Marine Act of 1936[10] as providing this statutory barrier. Section 506 provides that the owner of any ship built with construction-differential subsidy must agree that the vessel is to be operated only in foreign trade, except for certain intermediate stops in the United States or its territories as part of world-wide voyages or under temporary waivers granted by the Agency not to exceed six months in any one year.[11] The exact language of § 506 constituting this statutory bar, with two exceptions, is:

> Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade . . . [or on voyages with intermediate stops as part of world-wide voyages] . . . and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay . . . . [a proportional amount of the subsidy]. The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this chapter. [Proportional repayment of the subsidy again provided.]

While other sections of the Merchant Marine Act of 1936 are discussed by both sides in this case, § 506 is the centerpiece about which the argument turns, and in our view its proper interpretation is decisive here.

[9] *See id.* at 6.

[10] 46 U.S.C. § 1156 (1970).

[11] *Id.*

B. *Factual*

The *Stuyvesant*, a 225,000 deadweight ton oil tanker, was built at a total allocated cost of $102.7 million by Seatrain Shipbuilding Corporation.[12] The United States Government's contribution to the financing was as follows: [13]

$27.2 million—

> construction-differential subsidy awarded by the Agency in 1972, the equivalent of 26% of the total cost of construction of the Stuyvesant, under Title V of the Merchant Marine Act of 1936;

$30.2 million—

> loans guaranteed by the Agency under Title XI of the Act;

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[12] *See* Brief for the Secretary of Commerce and Other Federal Appellees at 15-16 & n.11. *Cf.* Affidavit of Robert Brown, Vice President-Finance of Seatrain Lines, Inc., parent company of intervenors Seatrain Shipbuilding Corp. and Polk Tanker Corp., Jt. App. at 256, 262 (approximate $120 million cost of eventual "sale" of *Stuyvesant* to United States Trust Company as owner-trustee for General Electric Credit Corporation) (affidavit dated 25 Sept. 1977) [hereinafter cited as Affidavit of Robert Brown]. Other estimations of the value of costs of construction of the *Stuyvesant* at different times, however, have yielded different figures. *See, e.g.*, letters of James Dawson, Jr., Secretary of Maritime Administration, to Polk Tanker Company and Queensway Tankers, Jt. App. at 208, 209; 213, 214 (construction costs of $70.2 million and net interest of $5.4 million, yielding figure of "final actual cost of construction" of approximately $75.6 million) [hereinafter cited as letters of James Dawson].

[13] *See* Affidavit of Robert Brown, *supra* note 12, Jt. App. at 257-61 (reviewing construction-differential subsidy payment for *Stuyvesant* and loans conferred or guaranteed by Economic Development Administration); letter of Howard Pack, Prseident of Seatrain Lines, Inc., to Robert Blackwell, Assistant Secretary for Maritime Affairs, Jt. App. at 190, 191 (noting debt financing under Title XI) (letter dated 8 July 1977) [hereinafter cited as letter of Howard Pack].

$5 million—

> loan by the Economic Development Administration (EDA), another agency of the Department of Commerce, for conversion from military to civilian purposes of the former Brooklyn Naval Yard, which constructed the *Stuyvesant* and other ships for Seatrain Shipbuilding Corporation (Seatrain);

$73.8 million—

> EDA guarantee to the extent of 90% of additional $82 million private loans to Seatrain Shipbuilding for the purpose of developing and maintaining the Brooklyn Naval Yard.

In accordance with § 506 of the Act, as a condition to receiving the $27.2 million subsidy, Seatrain and Polk Tanker Corporation (Polk), the vessel's purchaser, executed agreements to operate the *Stuyvesant* exclusively in the foreign trade of the United States.[14]

In contrast with two similar vessels constructed by Seatrain Shipbuilding, when the Title V subsidy and the Title XI financing insurance were awarded, the *Stuyvesant* had no firm commitment for employment in the foreign trade. Unfortunately, on its completion in 1977, there were still no prospects for the *Stuyvesant* in foreign comerce.[15] As the *Stuyvesant's* owners looked about

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[14] *See* Construction-Differential Subsidy Contract MA/MSB-164 between the Maritime Subsidy Board and Seatrain Shipbuilding Corp., Jt. App. at 112, 114 (subsidy conferred to aid construction of vessel "to be used in the foreign commerce of the United States") (preamble) (contract signed 30 June 1972); Contract between the Maritime Subsidy Board and Polk Tanker Corporation, Contract MA/MSB-165, Article 9(b)(i), Jt. App. at 160. 177 (purchaser agrees that vessel "shall be operated exclusively in foreign trade. . .") (contract signed 30 June 1972).

[15] *See* Affidavit of Robert Brown, *supra* note 12, Jt. App. at 257-60 (severe downturn in demand for crude oil tankers in 1975 forced cessation of construction of *Stuyvesant*, as well as of tanker *Bay Ridge*; construction of *Stuyvesant* recommenced upon agreement

for her gainful employment, they observed the changed situation in the carriage of Alaska oil. Contrary to original expectations, Alaska crude was not being carried from Valdez on relatively short hauls to U.S. West Coast ports, but because of the glut of oil in the West was being hauled around Cape Horn to the Eastern United States and the Caribbean. Furthermore, the world tanker tonnage over-supply had little effect on this trade, because this trade by U.S. maritime laws was largely confined to American-flag vessels.[16]

There was, however, one obvious obstacle: while the *Stuyvesant* was American-built, it was also constructed by subsidy and thus was not eligible for employment in the domestic coastwise trade. To overcome this obstacle in July 1977 the *Stuyvesant* owners applied for a three-year waiver of the § 506 restrictions on employment of the ship in other than the U.S. foreign trade, invoking the general contract-making authority of the Secretary of Commerce under § 207 of the Merchant Marine Act of 1936.[17] The present plaintiff-appellants and others

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by Standard Oil Company of Ohio (SOHIO) to charter vessel for three years of use in coastal "domestic" trade); Brief for Appellees-Cross Appellants Seatrain Shipbuilding Corporation and Polk Tanker Corporation at 8 (no business available for *Stuyvesant* in foreign commerce; SOHIO domestic charter the only option) [hereinafter cited as Brief for Seatrain and Polk Tankers].

[16] *See generally* Affidavit of Charles Dunagan, Shell Oil Company, Jt. App. at 282, 283-86 (comparing projected demand for tankers in the domestic Alaskan oil trade with available unsubsidizer tanker supply) (affidavit of 12 October 1977); Affidavit of of John Ervin, President of Trinidad Corporation), Jt. App. at 493, 496 (projected U.S. coastal trade is only viable market for unsubsidized domestic vessels) (affidavit of 21 September 1977).

[17] 46 U.S.C. § 1117 (1970) (authority to "enter into such contracts . . . as may . . . be necessary . . . to protect, preserve, or improve the collateral held by the [Federal Maritime] Commission . . . to secure indebtedness. . . ."). *See* letter of Howard Pack, *supra* note 13, Jt. App. at 190, 193-202 (application for three-year waiver, urging resolution of possible conflict between sections 207 and 506 of Merchant Marine Act of 1936, 46 U.S.C. §§ 1117 & 1156 (1970) in favor of section 207).

intervened before the Agency, pointing out that § 506 of the Merchant Marine Act specifically provided only for a six-month waiver and that there was no legal authority for a three-year waiver. In response to these objections, the *Stuyvesant* owners (intervening defendants here) withdrew their application.[18]

There followed a series of *ex parte* meetings between the Agency and Seatrain and Polk.[19] On 25 August 1977 Polk presented a new offer to the Agency, which would permit the *Stuyvesant* to operate in the Alaskan or any other domestic trade. The offer also provided that the Agency release the restrictions required by the statute and embodied in the subsidy contract upon Polk's execution of a twenty-year promissory note payable in 40 semiannual installments as reimbursement of the amount of the subsidy and other monies advanced by the Government.[20] This letter application was not published in the Federal Register, but the Agency by two letters of 31 August 1977 to Polk and Queensway Tankers, Inc. (the proposed operator of the *Stuyvesant*) approved the application to waive the restrictions *permanently* as well as various other features of the complicated refinancing necessary.[21]

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[18] *See* letter of Steve Russell, Polk Tanker Corporation, to Robert Blackwell, Assistant Secretary for Maritime Affairs, Jt. App. at 207 (withdrawing three-year waiver request) (letter dated 26 August 1977); Affidavit of Robert Brown, *supra* note 12, Jt. App. at 260 (application of Polk to Maritime Administration for three-year waiver withdrawn because of "numerous protests" against application).

[19] *See* Brief for Alaska Bulk and Trinidad, *supra* note 8, at 10.

[20] *See* Affidavit of Robert Brown, *supra* note 12, Jt. App. at 260-61 (Polk offer to repay construction-differential subsidy in return for removal of domestic use restrictions); letter of Steve Russell, Polk Tanker Corporation, to James Dawson, Secretary of Maritime Administration, Jt. App. at 203 (formal application for removal of use restrictions and providing terms of subsidy repayment).

[21] *See* letters of James Dawson, *supra* note 12, Jt. App. at 208, 213 (outlining steps toward financing of *Stuyvesant*); letters of James Dawson to Polk Tanker Corporation, Jt. App. at 72-75 (per-

On 22 September 1977, appellants filed this action in the District Court, one day prior to the scheduled closing of the entire transaction. A temporary restraining order was granted, ultimately preliminary injunction was denied, and the transaction was consummated on 30 September 1977. After extensive discovery, cross-motions for summary judgment on the merits were filed and the District Court ruled for the defendants on the principal issue of the Agency's authority to waive permanently the restrictions on employment of the *Stuyvesant* in the U.S. domestic maritime trade.[22]

II. The Issue

We regard the issue as one of straightforward statutory interpretation, primarily of § 506, and, to whatever extent relevant, of other sections of the Merchant Marine Act of 1936.

The trial court phrased the first of his stated four legal issues as:

> [W]hether the Secretary has the legal authority under the Merchant Marine Act of 1936 to remove domestic trading restrictions upon the operation of a vessel built with . . . [construction-differential

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manently removing use restrictions on vessel to permit shipping of "Alaskan oil to the lower 48 states") (letter dated 31 August 1977). Because of the disposition we make of one issue we consider critical to this case, an examination of the other financing measures is not needed here. These measures are described in detail in the District Court's opinion. *See Shell Oil Co.* v. *Kreps, et al.*, 445 F.Supp. 1128, 1132-33 (D.D.C. 1977).

[22] *See Shell Oil Co.* v. *Kreps, et al., supra,* 445 F.Supp. at 1138. Though the District Court decided other issues, such as the need to remand to the Agency for a determination of the competitive effect of the *Stuyvesant's* entry into domestic trade, *see id.* at 1140-44, none of these issues is relevant to the question which we find to be dispositive of this case.

> subsidy] in exchange for repayment in full of the . . . [construction-differential subsidy]. . . .[23]

The trial court found no explicit authority for the Agency action challenged here, either in § 506 or any other part of the Act, but held that there must be inherent Agency power after subsidy repayment to waive permanently the § 506 bar on a vessel's operation in the U.S. domestic trade. Our analysis is to the contrary: a proper construction of § 506 shows that the statute implicitly bars such waiver, the legislative history of § 506 supports this, and no other statutory provision either explicitly or implicitly gives rise to the authority asserted by the Agency here.

III. Analysis of Section 506 of the Merchant Marine Act of 1936

A. *Section 506 on Its Face*

The initial clause of § 506 is rather explicit:[24]

> Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade. . . .

Recalling our discussion above, the purpose of this clause is obvious: a construction-differential subsidy is only to make American-built vessels competitive with foreign-flag vessels in the foreign trade; there is no need or purpose to make subsidized vessels competitive in the U.S. domestic trade, because these vessels are exclusively built in American shipyards without subsidy. To put subsidized vessels into that trade would be unfair to owners who have built and purchased without Govern-

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[23] *See id.* at 1131. Since we reach a result opposite from that of the District Court on this issue, we do not find it necessary to reach the other three legal issues posited by the District Court.

[24] 46 U.S.C. § 1156 (1970).

ment subsidy, and ultimately would eliminate unsubsidized U.S. shipbuilding. Section 506, therefore, is *the clause* in the Merchant Marine Act which separates the two fleets, *i.e.*, the Jones Act domestic trade fleet (unsubsidized), and the U.S. foreign trade fleet (subsidized).

The statutory language is strong: "Every owner . . . shall agree." [25] It is not just the original builder or first purchaser, but every owner during the life of the vessel who must agree to the restriction.[26] The restriction is "that the vessel shall be operated exclusively in foreign trade," for the obvious purpose aforementioned. The restrictive language also refers to a subsidy which "has been paid." The idea is one of permanence; once the ship has been constructed by Government assistance of up to 50% of its original construction cost, the ship is dedicated to the U.S. foreign trade. Payment of the subsidy stamps indelibly the character of the ship then and thereafter.

1. *Exclusion of Other Exceptions*

Section 506 not only mandates the owner's obligation to operate the vessel exclusively in U.S. foreign trade, but it provides the only exceptions to that obligation to be found in the Merchant Marine Act. These exceptions are, first, that certain intermediary stops may be made in the course of long voyages in foreign trade,[27] where the American vessel naturally would touch at more

[25] *Id.*

[26] Further, in the present case, a restriction on use of the *Stuyvesant* applicable to all future owners is written into the construction-differential subsidy contract itself. *See* Contract between the Maritime Subsidy Board and Polk Tanker Corporation, Contract MA/MSB-165, Article 9(d), Jt. App. at 160, 178 ("The foregoing provisions [which require the purchaser to operate the vessel exclusively in foreign trade] shall run with the title to the Vessel and be binding on all owners thereof.").

[27] 46 U.S.C. § 1156 (1970).

than one American port and it would be uneconomic to forbid the vessel to carry cargo between such American ports. Second, the Agency may consent to the *temporary* operation of a subsidized vessel in U.S. domestic maritime trade for a period not to exceed six months in any one year if such operation is deemed "necessary or appropriate to carry out the purposes" of the Act.[28] If either exception is invoked, the owner must pay back that part of the construction subsidy proportional to the period of the exception.[29]

In the entire Merchant Marine Act, only § 506 explicitly does these three things:

(1) mandates the vessel's exclusive operation in the U.S. foreign trade;

(2) provides two exceptions to such exclusive foreign trade operation; and

(3) authorizes the Agency to accept payback of subsidy for vessels to operate in the domestic trade.

The obligation of exclusive operation is clear, the two exceptions are precise and limited, and the financial consequences of invoking the exceptions are equally precise and clear.

Since these provisions are so clear on the face of the statute, we are puzzled by the trial judge's statement that ". . . *nothing* in section 506 . . . either expressly or implicitly addresses the issue of *permanent* revocation of a . . . [construction-differential subsidy] contract." [30] By the usual canons of statutory construction, we think the issue of *permanent* revocation of a construction-

[28] *Id.*

[29] *Id.*

[30] *Shell Oil Co.* v. *Kreps et al.*, 445 F.Supp. at 1135 (emphasis of the District Court).

differential subsidy contract *is* addressed implicitly by the specific enumeration of the permissible exceptions to the vessel's permanent dedication to U.S. foreign trade. Where a statutory mandate is laid down, followed by specifically enumerated exceptions to such mandate, and where neither this mandate nor exceptions thereto are found anywhere else in the same statute, we think that the unquestioned canon of statutory construction is that the enumerated exceptions are *exclusive*, and that any other exception (here, permanent waiver or revocation of vessel use restrictions) is ruled out implicitly.[31]

2. *Findings of Need as Essential Basis for Limited Waiver*

That § 506 implicitly forbids the *permanent* lifting of the bar to employment of the subsidized vessel in the domestic trade is borne out by examination of the procedure for implementing the limited waiver which *is* authorized by § 506. On inquiry by the court at oral argument as to what finding the Secretary would need to make under § 506 to justify consent to place the subsidized vessel for six months in the domestic trade, counsel for the Agency promptly replied, ". . . what the need . . . [for vessels] will be in the foreseeable future . . . ." [32] It was then observed that § 506 requires

[31] *See, e.g., National Railroad Passenger Corp.* v. *Nat'l Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974), *reh. denied*, 415 U.S. 952 (1974) *Continental Casualty Co.* v. *United States*, 314 U.S. 527, 533 (1942); *Saxon* v. *Georgia Ass'n of Independant Insurance Agents, Inc.*, 399 F.2d 1010, 1013-14 (5th Cir. 1968); *Gotkin* v. *Miller*, 379 F.Supp. 859, 865 (E.D. N.Y. 1974), aff'd, 514 F.2d 125 (2d Cir. 1975); *Herzberg* v. *Finch*, 321 F.Supp. 1367, 1369 (S.D. N.Y. 1971).

[32] Statement of Michael Kimmel, representing the Secretary of Commerce, 16 October 1978.

This response of counsel is supported by the criteria for granting a six-month waiver to the prohibition of domestic use of subsidized vessels set forth in the Federal Regulations. In a

a partial return of the subsidy proportional to the limited term the vessel is permitted in the domestic trade, and therefore a complete return of subsidy might be thought consistent with a permanent lifting of the barrier against employment in the domestic trade, if such permanent waiver were authorized. Continuing with the analysis, the question then arises, what finding should the Secretary make as a basis for consent to the *permanent* waiver of the restriction? To this Government counsel responded that prediction of need for a vessel "would be really . . . impossible to make over 25 years. The Secretary can only predict what the needs will be . . . [for] about three years." [33]

Thus the analysis of the Government will not stand up. Where a waiver for a limited period is involved, it is rational to believe that the Secretary can make a finding of need for the vessel for a limited period of time, since the Government agencies and private businesses frequently make economic judgments for a period of six months. In the case at bar, the determination by the Secretary of the need for the *Stuyvesant*, and the noncompetitive effect of the *Stuyvesant's* entry into the Alaska oil trade, was made for a limited period. However, a finding of need and no competitive effect resulting from the entry of a subsidized vessel into the entire U.S. domestic trade for the permanent life of the vessel

final agency rule with effective date of 30 June 1977, the Maritime Administration provided that the owner or charterer of a tank vessel in applying for such a waiver must disclose for agency consideration "[a]ll available information to support the applicant's assertion that suitable vessels of a competitor would not be available for the prospective voyage or voyages." In addition, the rule that provides that consideration will be made by the Administration of all timely protests to the waiver request received from prospective competitors. *See* 46 CFR Ch. II, Part 250, subsections 250.3 & 250.4, *reprinted in* 42 FED. REG. 33035-36 (1977).

[33] *See* Statement of Michael Kimmel, *supra* note 32.

—a period in excess of 25 years—is a finding impossible to make. No Government agency or private enterprise can logically make a finding of need for this or any other vessel for its entire life.[34]

[34] This assessment was apparently shared by the Maritime Subsidy Board, Maritime Administration, and Department of Commerce (collectively, the Agency) in the Agency's Final Opinion and Order on Remand for Reconsideration from the District Court's earlier opinion. *See T. T. Stuyvesant—Repayment of CDS Operation in Jones Act Trade,* MSB Docket No. A-124 (6 Jan. 1978) [hereinafter cited as *T. T. Stuyvesant—Repayment of CDS*], Jt. App. at 590, on remand from the District Court's opinion in *Shell Oil Co.* v. *Kreps et al., supra.* On the issue of the likely competitive effect of a permanent waiver of the *Stuyvesant's* use restrictions, an issue which the District Court found had been afforded inadequate consideration by the Agency, *see id.* at 1140-43, the Agency found that an "assessment of [future] supply and demand" for tankers in the Alaska oil trade is "based on a number of variables that might change." *T. T. Stuyvesant—Repayment of CDS, supra,* Jt. App. at 610. These variables include the degree of foreign flag-ship carriage of Alaskan oil to the Virgin Islands, *see American Maritime Association* v. *Blumenthal,* —— F.2d —— (D.C. Cir. 1978) (foreign-flag vessels not barred by Jones Act from carrying Alaskan oil to Virgin Islands and then carrying products refined from that oil to mainland from Virgin Islands); need for tankers in Soviet grain programs; the possibility of reduced cargo deadweight passage of large vessels through the Panama Canal; the effect of implementation of more stringent U.S. Coast Guard pollution control regulations; and the possibility of increased mainland production. *See T. T. Stuyvesant—Repayment of CDS, supra,* Jt. App. at 610-11. As a result of these and other "uncertainties," the Agency on remand *in early 1978* found that it was "difficult or impossible to predict the supply and demand of tankers in the Alaska oil trade *beyond 1980. . . .*" *See id.* at 611 (emphasis added). Despite these findings, the Agency aimed to bolster its decision to waive permanently the use restrictions of the *Stuyvesant* by concluding that "there is no substantial basis known on which to conclude that . . . [permanent waiver of use restrictions on the *Stuyvesant* would bring about] any unfair competition through displacement of any unsubsidized vessels that may be in . . . [the Alaska oil] trade in the future." *Id.* We would conclude just the opposite: That because of numerous uncertainties involved in both the global and domestic oil trade, and consequently in the demand for vessels to carry that oil, there is no rational basis on which a finding of need can be made for a vessel in a particular trade for that vessel's life—a period *much longer* than the three year limit to estimation of future need set by the Agency.

If it is logically possible to make a finding of need and noncompetitive effect for a limited period of six months, or perhaps even three years, then lifting the restrictions for that limited period has a logical basis. If it is logically impossible to make a finding of need or noncompetitive effect on a permanent basis, for the entire life of this new vessel, *then it is logically impossible to make the only finding which will sustain rationally the waiving of the restriction against the employment of the subsidized vessel in the domestic trade.* For a limited period the finding to sustain the waiver can be made; for an unlimited period the finding to sustain the waiver cannot be made; therefore, the waiver for a permanent period cannot be made.

B. *Legislative History of Section 506*

We think that § 506 properly analyzed forbids by implication the grant of the permanent waiver by the Agency here. The trial court asserted that "*nothing* in section 506 . . . or in the legislative history of these provisions either expressly or implicitly addresses the issue of *permanent* revocation of a . . . [construction-differential subsidy] contract."[35] Since we do, however, find support in the legislative history for the statutory interpretation set forth above, we will discuss briefly the legislative history as we have found it.

1. *The Original 1936 Act*

Prior to the enactment of the Merchant Marine Act of 1936, the question of possible permanent release from the restriction against the employment of subsidized vessels in the U.S. domestic trade was discussed. Some original proponents of the 1936 Act urged inclusion of a provision allowing such release; others did not. All in

[35] *See Shell Oil Co.* v. *Kreps et al., supra,* 445 F.Supp. at 1135 (emphasis of the District Court).

all, some fifteen versions of the finally enacted Merchant Marine Act of 1936 were considered.[36] A number of drafts of the eventual § 506 which were before the Congress in 1935 and 1936 provided for time-unlimited waivers conditioned upon repayment of subsidy.[37] For example, the bill that first passed the House in 1935, but failed to win approval in the Senate, allowed a vessel constructed with the aid of Government subsidy to operate in the domestic trade, if the owner received the "written consent of the . . . [Agency] so to operate" and repaid to the United States that amount of the construction subsidy proportional to the "remaining economic life of the vessel." [38] Since the prior experience of Congress with construction subsidies had shown that the domestic operation of ships constructed under subsidy could disadvantage the unsubsidized Jones Act fleet,[39]

[36] *See, e.g.*, H.R. 8555, 74th Cong., 1st Sess. § 507 (introduced in the Senate 13 May 1935, reported with an amendment, 29 July 1935); S. 3500, 74th Cong., 2d Sess. § 506 (introduced in the Senate 6 January 1936); S. [illegible] 74th Cong., 2d Sess. § 506 (introduced in the Senate 24 February 1936); S. 4110, 74th Cong., 2d Sess. § 27 (introduced in the Senate 24 February 1936); H.R. 8555, 74th Cong., 2d Sess. § 506 (introduced in the Senate 24 April 1936).

[37] *See, e.g.*, H.R. 7521, 74th Cong., 1st Sess. § 504 (1935) (introduced by Judge Bland, Chairman of House Committee on Merchant Marine and Fisheries); S. 2582, 74th Cong., 1st Sess. § 504 (1935) (introduced by Sen. Copeland, Chairman of Senate Commerce Committee).

[38] *See* H.R. 8555, 74th Cong., 1st Sess. § 507(b), passed by the House 27 June 1935. *See also* H.R. Rep. No. 1277, 74th Cong., 1st Sess. 22 (1935) (report of House Committee on Merchant Marine and Fisheries, to accompany 1935 version of H.R. 8555, not passed by the Senate) ("The . . . [Agency] may, on certain conditions, consent to the operation of . . . a [subsidized] vessel in the domestic trade in which case . . . [a proportional] amount of the subsidy shall be repaid . . . .").

[39] *See* S. Rep. No. 898, 74th Cong., 1st Sess. 14-15 (1935) (intercoastal mail delivery by subsidized American vessels works to disadvantage of unsubsidized American competitors and to American merchant marine).

later drafts reported to the Senate restricted the Agency's authority to lift the restriction against domestic trading. For example, one draft considered by the Senate in 1936 permitted permanent waivers, *but* provided that the Agency could not grant any waiver transferring a subsidy-built vessel to the domestic fleet "except to replace a vessel engaged in such trade, or unless there are not available vessels to serve adequately the needs of commerce" in a particular domestic service "in which it is proposed to operate such vessel." [40]

The drafting and redrafting process, with numerous conflicting versions of the Merchant Marine bill appearing and disappearing, understandably introduced certain confusions and conflicting passages in the ultimate legislation. The final Act [41] included visible traces of individual legislators' conflicting desires which produced a § 506 that, although ambiguous, could have been construed to mean that permanent release could be granted by the Agency on repayment of that part of the subsidy proportional to the remaining life of the vessel.

As originally enacted in 1936, § 506 read: [42]

> It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an

[40] S. 3500, 74th Cong., 2d Sess. § 506(c) (introduced in the Senate 6 Jan. 1936).

[41] *See* Pub. L. No. 74-835, ch. 858, 49 Stat. 1985 (29 June 1936), now amended, 46 U.S.C. § 1101 *et seq.* (1970).

[42] *See id.*, 49 Stat. 1999 (emphasis added).

island possession or island territory of the United States, *unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life.* If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: *Provided,* That no operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months. . . .

The ambiguities of the language above are apparent. Although the non-italicized first half of the long first sentence of the 1936 version generally prohibited domestic operation of a subsidized vessel, the italicized second half of that sentence arguably created a general exception to that prohibition. That exception was conditioned only upon "written consent of the Commission" and agreement by the shipowner to repay to the Commission an amount of subsidy proportional to the "remaining economic life of the vessel." This exception was not expressly confined to any particular economic conditions or to any type or duration of voyage. The second sentence of the section dealt with temporary transfers of a subsidized vessel to domestic service at times of "emergency," and could be read not to limit the much broader exception to the prohibition provided in the first sentence. It was thus possible to read the 1936 version of § 506 as authorizing both (1) an unlimited waiver (despite the absence of specific reference to such a waiver), conditioned only upon approval of the Commission and the shipowner's agreement to repay a portion of the subsidy; and (2) a temporary waiver allowable for a period of three months, and only in the case of national emergency.[43]

On the other hand, the second sentence of § 506 as passed in 1936 could also be read as qualifying the first sentence, so as to disallow permanent waivers in favor of waivers allowable for periods of no more than three months in the event of an "emergency."[44] Regardless

[43] This interpretation is supported by commentary inserted in the record of Senate Hearings by Senator Guffey, sponsor of S. 4110, 74th Cong., 2d Sess. (1936), concerning two of the three bills that formed the basis of the committee print eventually passed by the Senate in 1936 and later also by the House, as the Merchant Marine Act of 1936. *See Merchant Marine Act, 1936: Hearings Before the Committee on Commerce of the United States Senate,* 74th Cong., 2d Sess. 121, 124 (1936) (comment on S. 3500, bill introduced by Sen. Copeland and altered in committee print 3 March 1936) ("Section 506(b) . . . states that, *except as later provided,* no vessel on which a subsidy has been paid shall be operated in other than foreign trade *unless the unamortized construction differential is repaid to the* [*Agency*] . . . .") (emphasis added); *id.* at 133 (comment on S. 4110, bill introduced by Senator Guffey) ("Provision is made . . . for the transfer of . . . [a subsidized] vessel from a foreign service to the intercoastal service if in the opinion of the Commission the conditions warrant such transfer, provided that the owner will immediately pay to the Commission the unamortized portion of said subsidy.").

[44] Though this reading of the language seems less plausible to this court than the earlier one, and is urged by none of the parties to this case as the correct reading of the statute in force in 1936, the Chairman of the U.S. Maritime Commission in testimony before a House Committee in 1938 premised his proposals for amendments to the section on the fact that the interrelation between the first and second sentences of § 506 was unclear. He proposed an amendment to the section which led to the deletion of all language in the first sentence that appeared to authorize a permanent waiver and which was arguably in conflict with the second sentence, thus removing the very source of the claimed "ambiguity." *See* pp. 27-30 & notes 46-53 *infra.*

of one's reading of the language of § 506 as enacted in 1936, however, it is perhaps most critical to the present case to note that legislative history of the section shows that *the issue of use restriction waivers—whether temporary or permanent, and whether allowed or disallowed —was addressed by that section and nowhere else in the Merchant Marine Act of 1936.* Not a scintilla of legislative comment or debate has come to light which indicates that any other section or provision of the Act provided authority for, or was intended to deal in any way with, the issue of waivers to restrictions imposed by § 506.[45]

2. *1938 Amendments*

In 1938, comprehensive amendments were passed to the Merchant Marine Act of 1936.[46] With regard to § 506 of the Act, then Maritime Commission Chairman Joseph P. Kennedy stated that the purpose of the proposed amendment was to remove "ambiguities" and "confusions" in the section, described as follows: [47]

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[45] Appellees, however, have claimed to find such authority in § 207 of the Act. *See* pp. 44-46 & notes 104-10 *infra.*

[46] *See* Act of 23 June 1938, § 18, 52 Stat. 958 (amending § 506).

[47] *See Amending Merchant Marine Act, 1936: Hearings on H.R. 8352 Before the House Committee on Merchant Marine and Fisheries,* 75th Cong., 2d & 3d Sess. 8 (1937-38) (emphasis added) [hereinafter cited as *House Hearings on 1938 Amendments*].

Appellants have appropriately pointed out, *see* Brief for Appellant Shell Oil Co. at 33-34, that the Commission Chairman's interpretation of the Amendments proposed in 1938 and of the reasons for their proposal are entitled to carry weight, since the Chairman headed the agency that administered the Act at the time of the Amendments, *see Zemel* v. *Rusk,* 381 U.S. 1, 11 (1965), *reh. denied,* 382 U.S. 873 (1965); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965) *reh. denied,* 380 U.S. 989 (1965), and the Chairman played an active role in drafting the legislation and obtaining its passage, *see Zuber* v. *Allen,* 396 U.S. 168, 192-93 (1969) (departmental construction of its enabling legislation carries most weight when administrators participated in drafting and made known their views before Congress in hearings). Furthermore, the Chairman's views as stated in

> The section now provides that the owner can only engage in foreign trade exclusively with certain enumerated excepted services, for which services the owner is required to repay part of the construction-differential subsidy. There are also provisions which appear to give owners the right to engage in services other than the excepted ones, if the Commission consents to such use and the owner repays part of the construction-differential subsidy. *Whether this right is restricted to the cases of emergency and to periods of three months as mentioned in the section, it is difficult to determine.*

When the Maritime Commission Chairman noted that "[it is difficult to determine] [w]hether this right [to engage in non-excepted services] is restricted to . . .," he referred to "the cases of emergency and to periods of three months." He did not specifically mention the other alternative of his "whether," but this could only have been the arguable alternative at the end of the first sentence of § 506 as enacted in 1936, *i.e.*, the ambiguous reference to repayment of subsidy proportional to the economic life of the vessel in return for the lifting of restrictions on the use of that vessel.[48] Thus the Maritime Commission Chairman sought to relieve the ambiguity of whether the section authorized a permanent lifting of use restrictions in return for repayment of subsidy, or merely a temporary waiver on the ground of emergency. The proposed 1938 amendment, which was adopted by both Houses and stands essentially un-

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hearings were accepted almost verbatim into the reports of both of the committees of Congress responsible for acting on the Amendments, *see* p. 29 & note 52 *infra,* and we find that the Chairman's interpretation of the meaning and purpose of the Amendments is the most plausible one in light of the language of the Amendments themselves, *see* p. 28 *infra.*

[48] *See* p. 24 *supra.*

changed as the present § 506,[49] resolved the ambiguity by eliminating all of the language in the original section that established the arguable exception to that section's general prohibition of domestic use, *i.e.* the clause that begins, "unless the owner [shall receive consent] . . ." [50] Thus the amendment removed the only language that could be interpreted to authorize a permanent waiver, and substituted therefor a clause requiring repayment of subsidy proportional to the gross revenue derived from the domestic leg of a foreign voyage.

The Maritime Commission Chairman described the effect of these changes as follows: [51]

> If the owner desires to engage in domestic trades other than . . . [domestic portions of world voyages], he can do so only by receiving the consent of the Commission. *The consent for this service is limited to 6 months in any one year.* . . . [T]he section as rewritten will result in improved administration and will protect the interests of the Government and those of the carriers, both foreign and domestic.

This explanation by the Commission Chairman was incorporated almost verbatim into both the Senate and House reports which accompanied the bill amending § 506 in 1938,[52] thus demonstrating irrefutably that Congress

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[49] *See* 46 U.S.C. § 1156 (1970), *reprinted* at pp. 8-9 *supra.*

[50] *See* language of § 506 in original 1936 Act, *reprinted* at pp. 23-24 *supra.*

[51] *See House Hearings on 1938 Amendments, supra* note 47, at 8-9.

[52] The Senate Commerce Committee, *see* S. Rep. No. 1618, 75th Cong., 3d Sess. 12-13 (1938), stated (emphasis added):

> Section 506 has been entirely rewritten to remove ambiguities and confusion. . . . The section now makes it unlawful for the owner of any vessel on which a construction-differential subsidy has been paid to operate it, without the written consent of the Commission, other than exclusively in foreign trade. . . . The section further provides . . . that in the event the owner operates a vessel on which a construction-differential subsidy has been paid in services other than those which are not unlawful, he shall repay to the Commission a prescribed portion of the . . . subsidy. It is very difficult to determine whether or not these instances in which repayment is required are restricted to the cases of emergency and to periods of 3 months. . . .
>
> As the section is rewritten, it is . . . provided that *the Commission may consent in writing to the temporary transfer of . . . a vessel to services other than those enumerated for periods not exceeding 6 months in any year* whenever the Commission may determine that such transfer is necessary.

Similarly, the House Committee on Merchant Marine and Fisheries, *see* H.R. Rep. No. 2168, 75th Cong., 3d Sess. 21 (1938), stated (emphasis added):

> Section 506 . . . has been entirely rewritten in order to remove ambiguities arising from the method of describing the services other than foreign. *As rewritten the section clearly sets forth the obligation of the owner to use the vessel in foreign trade.* . . . No fundamental change in the original purpose of the section has been effected.

Appellees have suggested that the House Committee, in noting that "no fundamental change in the original purpose of the section has been effected" by the 1938 Amendment, must have intended that any authorization that existed in the 1936 Act for permanent waivers must have been carried through with the 1938 Amendments. *See* Brief for Seatrain and Polk Tankers, *supra* note 15, at 31. As we noted earlier, however, the most fundamental purpose of § 506, as generally of the Merchant Marine Act of 1936, was to provide subsidies to allow the American merchant marine to compete in foreign trade, and to separate the subsidized American fleet from the unsubsidized "Jones Act" fleet. *See* pp. 7-8 *supra.* It was undoubtedly this "original purpose" of Section 506, and of other sections of the Act, to which the House Committee referred in its report.

[53] *See* pp. 31-32 *infra.*

intended in 1938 to allow only temporary waivers, with duration of no more than six months.[53]

Thus it does not now matter whether some of the sponsors of the 1936 Act believed that language in the statute authorized a permanent lifting of restrictions in return for repayment of the full subsidy, because the action of the Congress in 1938 resolved the ambiguity

by removing from § 506 the only language which could be interpreted to authorize more than a temporary waiver of the restriction against employment in the domestic trade. In 1938 the intention of Congress was unmistably manifested: to eliminate the only statutory language which could arguably have authorized the permanent waiver of the domestic trading restriction upon repayment of subsidy, and to limit the waiver of the domestic trading restriction to six months in any one year, with no discretion in the Secretary to authorize a longer period.

No one in the present case, however, now contends that § 506, as amended, authorizes permanent waivers. The trial court specifically so stated,[54] and looked elsewhere in the statute for inherent authority in the Secretary to do this.[55] However, the 1936 version of § 506 is the *only* provision which any party to this case has ever cited as providing direct authority for permanent waivers. That language is now *gone*, by specific direction of Congress. We cannot believe that by deleting the only language in § 506 which could be argued to permit permanent waivers, and by leaving only language permitting temporary waivers, Congress thereby manifested an intention that the Agency should have *express* authority to issue *temporary* waivers under § 506 and *implied* authority to issue *permanent* waivers, pursuant not to § 506 but to some unexpressed inherent power conferred in other sections of the Merchant Marine Act of 1936.[56]

As we read the legislative history, both permanent and temporary waiver provisions were considered both in 1936 and in 1938 by the Congress, and Congress in

[54] *See Shell Oil Co.* v. *Kreps, et al., supra,* 445 F.Supp. at 1134-35.

[55] *See id.* at 1134.

[56] For discussion of these claims of authority found elsewhere in the Act, see pp. 44-52 & notes 104-29 *infra.*

1938 determined, on the recommendation of the Maritime Commission, to permit the Agency to grant only temporary waivers. This deliberate Congressional intent, pursuant to a carefully constructed policy to maintain separate subsidized and unsubsidized fleets, cannot be ignored by the Agency and the court on some vague notion of inherent power elsewhere, which it now might be convenient to utilize. Contrary to the assertion of the trial court that there was "nothing" in the legislative history of § 506 concerning permanent waivers,[57] and the court's further reference to "this total dearth of guidance from the statutory language and the legislative history," [58] we find ample legislative history relevant to this question. Legislative history of the 1936 Act is somewhat ambiguous, as was the 1936 statute itself. The legislative history of the 1938 amendment, however, confirms our present interpretation of the statutory language and demonstrates that whatever vestigial authority there was in the original 1936 Act to issue permanent waivers was eliminated by the 1938 amendment.

C. *Administrative Interpretation*

After remarking, erroneously we hold, on the "total dearth of guidance from the statutory language and the legislative history" of § 506, the trial court thus found a justifiable basis for turning to "other indicia of legislative intent" and "whether the [A]gency's interpretation of the Act 'serves to further the purposes of the legislation. . . .' " [59] The principal Agency interpretation cited by the court is "the Comptroller General's 1964 decision with respect to two . . . ships owned by Grace Line . . . both of which were built under . . . [construction-

[57] *See Shell Oil Co.* v. *Kreps, et al., supra,* 445 F.Supp. at 1135.

[58] *See id.*

[59] *See id.*, citing *Sea-Land Service, Inc.* v. *Kreps,* 566 F.2d 763, 778 (D.C. Cir. 1977).

differential subsidy] contracts. . . ." [60] In that 1964 decision [61] the Comptroller General advised the Secretary of Commerce, in accord with a legal opinion on the same question issued earlier by the Acting General Counsel to the Maritime Administration,[62] that the Agency had the legal authority to remove provisions in two construction-differential subsidy contracts signed between the Agency and Grace Line barring domestic operations of two Grace Line vessels, in return for "repayment to the Government of the unamortized construction-differential subsidy. . . ." [63] The Comptroller General reasoned that, "Upon the basis of the rationale for the repayment of subsidy [provided for by section 506 of the Merchant Marine Act of 1936], it appears that if . . . the unamortized subsidy is repaid to the Government, the owner should be in the same position as if he had paid the full domestic price of the vessel . . . and should not be bound to operate the vessel exclusively in foreign trade." [64]

The *Grace Line* affair, however, is no precedent [65] for what the Agency has attempted to do here. First, the two Grace Line vessels were not *built* under construction-

[60] *See Shell Oil Co.* v. *Kreps, et al., supra,* 445 F.Supp. at 1136.

[61] *See* Comptroller General Decision B-155039, 44 Comp. Gen. 180 (1964).

[62] Memorandum from Graydon L. Andrews, Acting General Counsel, Maritime Administration, to the Chairman, Maritime Subsidy Board, Jt. App. vol. III at 660-65 (Memorandum dated 28 July 1964).

[63] *See* Comptroller General Decision B-155039, *supra,* 44 Comp. Gen. at 184.

[64] *Id.*

[65] Appellants argue further that the Comptroller General Decision is incorrect on substantive grounds. *See* Brief for Alaska Bulk and Trinidad, *supra* note 8, at 33-34. In light of this court's opinion in the present case, we can only agree with appellants' argument. It is sufficient at present, however, to find that the Decision does not serve as precedent here.

differential subsidy contracts; they were originally built *un*subsidized, then later converted from cargo to container vessels by subsidy funds for use in foreign trade.[66] The 1964 action by the Agency was on the proposal of Grace Line, which was experiencing difficulties in operating the vessels abroad, to sell the vessels to a domestic operator for use in the domestic trade.[67] As we discuss in Part V, *infra,* the fact that the vessels were originally constructed in American yards without subsidy is important for basic Merchant Marine Act policies.[68] Competing domestic operators could take the tonnage of these vessels into account at the time the vessels were built in making their own future investment decisions. However, in the instant case, American carriers estimating future demand for Alaskan oil tankers could not have known that the *Stuyvesant,* under construction in American yards *with* subsidy, would in its initial operation try to enter the Alaskan market in competition with unsubsidized vessels.[69]

Second, the request to return the Grace Line vessels to the unsubsidized fleet was unopposed, so far as the record shows. It is also significant that there was no court test of the validity of the Agency's action in removing the restrictions on the vessel's use.[70]

[66] *See* Comptroller General Decision B-155039, *supra,* 44 Comp. Gen. at 180.

[67] *See id.*

[68] These fundamental policies were nowhere considered in the 1964 Comptroller General Decision, *see id.,* or in the earlier memorandum of the Maritime Administration Acting General Counsel to the Maritime Subsidy Board, *see* note 62 *supra.*

[69] *See generally* Brief for Alaska Bulk and Trinidad, *supra* note 8, at 6-8 (need to keep subsidized and unsubsidized fleets separate to enhance long-range investment decisions).

[70] Furthermore, the Comptroller General Decision is not binding on this court. *See Keco Industries, Inc.* v. *Laird,* 318 F. Supp. 1361. 1363 (D.D.C. 1970) (Comptroller General's opinion on legality of

Finally, the 1964 Comptroller General's opinion is totally inconsistent with the trial court's rationale as to the source of the Agency's authority to accept the return of subsidy in exchange for a waiver of use restrictions. The trial court specifically held that "*nothing* in section 506 . . . either expressly or implicitly addresses the issue of *permanent* revocation . . .," [71] and rested its approval of the Agency's action on the ground that "such authority is inherent in the Secretary's broad contractual authority provided by sections 504 and 207, 46 U.S.C. §§ 1154 and 1117" and is "expressly contemplated by section 1104(a)(3), 46 U.S.C. § 1274(a)(3) . . . ." [72] In 1964, however, the Comptroller General's opinion relied *solely* on § 506 as the source of the Agency's authority.[73] Therefore, we held that the 1964 *Grace Line* opinion furnishes no precedent for the trial court's rationale of a permanent waiver authority implicit somewhere else in the Act.

Nor do we agree that "[s]ince the 1964 *Grace Line* transaction, the Secretary has consistently interpreted section 506 as *not* precluding permanent waiver of domestic trading restrictions. . . ." [74] We find the Agency's internal interpretations of dubious consistency, and neither numerous nor impressive. In fact, the most thoroughly developed Agency interpretation cited by the court provides no support whatsoever for the Agency's

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contract not binding on courts); *United States ex rel Brookfield Construction Co.* v. *Stewart*, 234 F. Supp. 94, 100 (D.D.C. 1964), *aff'd*, 339 F.2d 753 (D.C. Cir. 1964) (Opinions of Comptroller General binding only on Executive Branch).

[71] *Shell Oil Co.* v. *Kreps, et al., supra*, 445 F. Supp. at 1135.

[72] *Id.* at 1134.

[73] *See* Comptroller General Decision B-155039, *supra*, 44 Comp. Gen. at 181-84.

[74] *Shell Oil Co.* v. *Kreps, et al., supra*, 445 F. Supp. at 1137.

action in the present case.[75] This Agency interpretation was formulated in response to the application in 1970 of Seatrain Lines, Inc., the parent corporation of the appellee Seatrain Shipbuilding Corporation here, for a construction-differential subsidy for two vessels other than the *Stuyvesant*. As part of its application, Seatrain sought from the Agency a contractual prior commitment to authorize future "*permanent* operation of the vessels in the domestic trade upon the repayment of the unamortized portion of . . . [the subsidy]." [76] In an opinion considering the legality of such a provision, the General Counsel to the Maritime Administration urged strongly against granting Seatrain's request because advance agreement to waive the prohibitions of § 506 would "conflic[t] . . . with the basic purposes of the . . . [construction-differential subsidy] provisions of the . . . [Merchant Marine Act of 1936]." [77] The General Counsel pointed out, as in the present opinion we have as well, that "Neither section 506 nor any other provision of the Act relating to the . . . [construction-differential subsidy] provides for releasing a . . . [ship built with such subsidy] from the domestic trade restrictions imposed by section 506 upon repayment of unamortized . . . [subsidy]." [78] The General Counsel no more than *implied* in his opinion that the Agency might have authority in a future case to grant a timely request for such a waiver,[79] and he set forth no circumstances or

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[75] *See* Legal Opinion of H. Clayton Cook, Jr., General Counsel to Maritime Administration, Department of Commerce, Jt. App. at 666-68 (10 December 1970) [hereinafter cited as 1970 Seatrain Opinion].

[76] *See id.*, Jt. App. at 666 (citing formulation of Seatrain's request by Department of Commerce) (emphasis in the original).

[77] *Id.*

[78] *Id.* at 668.

[79] *See id.* ("To approve an application for . . . [subsidy] on the basis proposed by Seatrain would, in effect, bind future Boards to exercise a discretionary authority . . . .").

conditions under which he believed such approval would be appropriate.[80] It is incredible, therefore, that the trial court and appellees in the present case find support in this General Counsel's opinion for the Agency's claim of authority to waive on a permanent basis the prohibitions of section 506.

The other Agency interpretations cited by the trial court are no more compelling.[81] The trial court reports that in 1976 the Agency amended two subsidy contracts to permit subsidy repayment and possible future entry into the domestic trade of two vessels operating between the Virgin Islands and the continental United States, "*if* the non-domestic status of the Virgin Islands is changed at some later date."[82] These contract amendments by

[80] The opinion suggested only that the Government in granting any such waiver—the propriety of which the General Counsel directly questioned, *see* p. 34 *supra*—would need to be assured an "adequate consideration." *See id.*

[81] *See Shell Oil Co.* v. *Kreps, et al., supra,* 445 F.Supp. at 1137.

[82] *See id.* (emphasis of the District Court). The Agency and shipowner in that instance were referring to § 21 of the Merchant Marine Act of 1920, 46 U.S.C. § 877 (1970), which excludes the Virgin Islands from the "coastwise laws of the United States until the President shall . . . declare that such coastwise laws shall extend to the Virgin Islands . . . ." This provision has the effect, until possible reversal by the President, of exempting ships carrying goods to and from the Virgin Islands from the domestic flag-ship requirements of the "Jones Act," § 27 of the Merchant Marine Act of 1936, 46 U.S.C. § 883. *See American Maritime Association* v. *Blumenthal,* No. 77-1934 (D.C. Cir. 20 Nov. 1978), slip op. at 18-19 n.43 (for limited purposes of Jones Act, Virgin Islands analogous to a foreign port). Owners of ships involved in the Virgin Islands trade may be understandably reluctant to bind themselves to an indefinite contractual bar against domestic use of those ships in light of the hotly contested status of the Virgin Islands exemption. *See id.,* slip op. at 25 & n.59 (ten bills introduced in various sessions of Congress to modify or repeal Virgin Islands exemption). Though we pass no judgment on the matter at the present time, in light of the court's present opinion we doubt that it would be appropriate to allow a shipowner to effect an end-run around the domestic use proscriptions of § 506 of the Merchant Marine Act of 1936, at issue here, even under the anomalous and potentially variable circumstances of the Virgin Islands trade.

the Agency were conditional, restricted, as yet unexercised, and therefore as yet unchallenged in any court. One further instance of Agency approval of a prospective waiver of domestic use restrictions on subsidized vessels has also been reported.[83] This waiver option, like that granted to the two vessels operating in the Virgin Islands trade, was apparently approved despite the earlier opinion of the General Counsel to the Maritime Administration in 1970 that such prospective agreement would "conflict with the basic policies" of the Merchant Marine Act of 1936 and, further, that no waiver of the § 506 proscription was authorized either by § 506 or by any other provision of that Act.[84] Also, the vessels which were the subject of this waiver, like the two Virgin Islands vessels, have not yet exercised their option and entered the domestic trade.[85]

Though the Agency actions on behalf of the owners of these various ships are arguably consistent with each other (if not with the advice of Agency legal counsel), they are all distinguishable on their facts from the present case, where an immediate rather than a prospective waiver is sought. The Agency actions do not, in any event, constitute compelling precedent in view of our present construction of the law, and clearly they do not bind this court.

The Grace Line reconversion remains the only instance of actual entry into domestic operations by vessels that

[83] *See* Affidavit of James S. Dawson, Jr., Secretary of Maritime Administration and Martime Subsidy Board, Jt. App. at 278, 280 (affidavit dated 28 September 1977) (approval granted in August 1977 of request by Wilmington Trust Company to repay construction-differential subsidy on two vessels under construction for trade between Indonesia and Japan).

[84] *See* 1970 Seatrain Opinion, *supra* note 75, Jt. App. at 666, 668.

[85] *See* Affidavit of James S. Dawson, *supra* note 83), Jt. App. at 280.

received construction-differential subsidy, but, as discussed above,[86] this Agency action likewise does not serve as precedent here. We also do not believe, as will be discussed herein,[87] that Congress has in any sense "ratified" the Grace Line action by subsequent enactments.

IV. Sections of The Merchant Marine Act of 1936 Relied Upon by the Agency and the Trial Court As Sources of Agency Authority

All parties to this appeal agree, and the trial court found,[88] that the Agency does have authority to accept total repayment of the construction-differential subsidy, if such repayment is offered. But, as is made amply clear by the argument of parties on this appeal, that is not the issue. The issue here is whether the Secretary has authority to lift permanently the restriction against entry of previously subsidized vessels into the domestic trade in return for such payment.[89]

We cannot assume that it follows as night follows day that if the subsidy is repaid in full, then the operating restriction against entry into the domestic trade must automatically be lifted. We have already set forth above the policy reasons that indicate why this should not be true,[90] and we develop these reasons more fully herein.[91]

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[86] *See* pp. 32-35 & notes 59-72 *supra*.

[87] *See* pp. 49-52 & notes 120-29 *infra*.

[88] *See Shell Oil Co.* v. *Kreps, et al., supra*, 445 F.Supp. at 1138.

[89] As the trial court pointed out, repayment of construction-differential subsidy may be made for purposes other than waiver of domestic use restrictions. *See id.* at 1134 n.1a ("permissible" repayment to obtain Title XI financing under 46 U.S.C. § 1274(b)(2) and for permission to engage in trade between foreign countries rather than between United States and foreign countries).

[90] *See* pp. 7-8 *supra*.

[91] *See* Part V *infra*.

But policy arguments aside, for the Agency to take the extraordinary step of removing the restriction on the originally subsidized vessel's operation in the domestic trade to allow competition of that vessel with U.S. ships built without subsidy, the agency must, in our view, find some specific authority in statutory law. The trial judge clearly and appropriately rejected the existence of any such authority, explicit or implicit, in § 506,[92] and he was right. The trial judge then turned to three other sections of the Act[93] to find such Agency authority, and there we think he was wrong.

Curiously, while the Government and the private party appellee here urge that affirmative authority to lift the operational restriction is found in sections 207, 504, and 1104(a)(3) of the Act, the trial court's opinion does not claim to find authority for lifting the restriction in those sections. The trial court said:[94]

> The threshold issue before the Court is whether the Secretary has authority to accept total repayment of . . . [construction-differential subsidy in exchange for the removal of the domestic trade restrictions imposed by section 506 of the Act, 46 U.S.C. § 1156. Resolution of this issue requires this Court to determine first whether the Secretary has the general authority to accept total repayment of . . . [the subsidy] after the subsidy contract has been executed, and second, whether section 506 bars the Secretary from removing domestic trade restriction in exchange for such total repayment.

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[92] *See Shell Oil Co.* v. *Kreps, et al., supra*, 445 F.Supp. at 1135 (issue of authority to allow permanent revocation not "address[ed]" by § 506).

[93] *See id.* at 1134 (citing sections 207, 504 & 1104(a)(3) of Merchant Marine Act of 1936).

[94] *Id.* at 1133-34.

The trial court's analysis thus reflects an assumption that accepting total repayment is extricably linked with removal of the domestic trade restriction—an assumption that it contradicts by citing other statutorily "permissible" reasons for which repayment might be made.[95] Though the trial court found no authority in section 506 or the other cited sections to waive domestic trade restrictions, but only to accept repayment of subsidy under "appropriate circumstances,"[96] the court nevertheless resolved that such a waiver was not "addressed" and thus not "precluded" by those sections.[97] The court then sought to justify the waiver by reference to a claimed, long-standing Agency understanding of this right and the "implicit" ratification by Congress of this right in certain amendments passed in 1972.[98] Thus the trial court found little more than an *assumed authority to accept repayment* without discussing, *in relation to the relevant statutory sections, whether this also included authority to lift the domestic trade restriction.*

On this appeal the Government and private party appellees have recognized the distinction by strenuously arguing that an additional legal determination is necessary to their case, *i.e.*, that the three statutory sections *do* affirmatively confer authority to lift the restrictions. In our own analysis, this second finding is necessary to the appellees' case and to support the trial court's judgment; but we do not find such authority in any of the three sections cited, and instead we find that § 506 itself is a positive bar to lifting the restrictions.

We turn now to consider each of those three sections.

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[95] *Id.* at 1134 n.1a.

[96] *See id.*

[97] *Id.* at 1135, 1138.

[98] *Id.* at 1137-39.

A. *Section 504, Title V, of the Merchant Marine Act of 1936 (46 U.S.C. § 1154)*

Section 504 grants to the Agency certain contractual powers: arguably the power both to make and to amend contracts conferring construction-differential subsidies, and the right to include terms which will protect the interest of the United States in subsidy contracts.[99] However, this contractual authority is not so broad as to eliminate restrictions mandated by statutes enacted specifically to protect maritime interests,[100] as the last sentence of § 504 makes unmistakably clear:[101]

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[99] Section 504 of the Merchant Marine Act of 1936, 46 U.S.C. § 1154, provides in pertinent part:

> If a qualified purchaser under the terms of . . . [Subchapter V of the Act, 46 U.S.C. §§ 1151-61] desires to purchase a vessel to be constructed in accordance with an application for construction-differential subsidy under this subchapter, the Secretary of Commerce may . . . contract to pay only construction-differential subsidy and the cost of national defense features to the shipyard constructing such vessel. The construction-differential subsidy and payments for the cost of national defense features shall be based upon the lowest responsible domestic bid. . . . No construction-differential subsidy, as provided in this section, shall be paid unless the said contract or contracts or other arrangements contain such provisions as are provided in this subchapter to protect the interests of the United States as the Secretary of Commerce deems necessary. Such vessel shall be documented under the laws of the United States. . . . The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the lawful or proper use or operation of the vessel, except to the extent expressly required by law.

[100] As the Appellee Secretary of Commerce concedes, ". . . [Section 504] does not specifically address the question whether the Secretary may later agree to amend the subsidy contract to recoup the subsidy in appropriate circumstances. . . ." Brief for the Secretary of Commerce and Other Federal Appellees at 49. *Accord*, Brief for Alaska Bulk and Trinidad, *supra* note 8, at 13 ("Nothing in section 504 speaks to authorization for the Secretary of Commerce to accept a payback of construction-differential subsidies for any reason. The section confers only authority to pay the subsidy, and says nothing about repayment.").

[101] *See* 46 U.S.C. § 1154 (1970) (emphasis added).

> The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the *lawful or proper use or operation of the vessel, except to the extent expressly required by law.*

Certainly, "lawful or proper use or operation of the vessel" requires conformity with other sections of the Merchant Marine Act, and with other statutes. Specifically, we think such use and operation must be in conformity with § 506.[102] The appellees agree that this language of § 504 refers to, among other provisions, the § 506 domestic trade restriction, but argue that § 506 does not purport to speak to the situation where the subsidy is repaid in full in exchange for an unlimited waiver.[103] As discussed above, we hold that § 506 does contain an implicit prohibition against a waiver unlimited in time.

In short, we find nothing whatsoever in § 504 which would authorize the lifting of the domestic trade restriction of § 506. To the contrary, the reference to "lawful or proper use or operation" refers to the § 506 restriction against entry of a subsidized vessel into the domestic trade.

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[102] This view is reinforced by review of the legislative history of the last sentence of § 504, which was added to the section by amendment in 1951. Reports of both the House and Senate Committees responsible for acting on that amendment stated explicitly: *"Subject to the exceptions contained in section 506 of the 1936 act as to use in domestic trades,* sections 1 and 4 [of the amendments] . . . provide that the lawful or proper use of a vessel constructed with . . . [construction-differential subsidy] may not be restricted." S. Rep. No. 295, 82nd Cong., 1st Sess. 4 (1951); H.R. Rep. No. 2221, 82nd Cong., 2d Sess. 25 (1952) (emphasis added).

[103] *See, e.g.,* Brief for the Secretary of Commerce and Other Federal Appellees at 50.

B. *Section 207, Title V, of the Merchant Marine Act of 1936 (46 U.S.C. § 1117)*

At oral argument, in discussing the statement in the Government's brief that "the Secretary will consider the advisability of issuing proposed guidelines or rules outlining the exceptional circumstances which might justify . . . [permanent waiver of domestic trade restrictions] in the future," [104] Government counsel was asked on what section of the Merchant Marine Act these guidelines and rules would be based. He immediately responded, "Section 207, which gives the Secretary contractual powers . . . ." [105] This was consistent with the position taken in the Government's appellate brief, which cited § 207 as the Agency's basic source of authority to take the action at issue here.[106]

The pertinent part of § 207 states: [107]

> The Federal Maritime Commission and the Secretary of Commerce may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its or his discretion, be *necessary to carry on the activities authorized by* [. . . *the Merchant Marine Act of 1936*] *or to protect, preserve, or improve the collateral held by the Commission or Secretary to secure indebtedness,* in the same manner that a private corporation may contract within the scope of the authority conferred by its charter.

We think § 207 is what is commonly called a "housekeeping statute," and a similar provision is found in

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[104] *See id.* at 31.

[105] *See* Statement of Michael Kimmel, *supra* note 32.

[106] *See* Brief for the Secretary of Commerce and Other Federal Appellees at 27-30.

[107] 46 U.S.C. § 1117 (1970) (emphasis added).

nearly every administrative agency basic statute. It is a section which details the means and methods of implementation of specific powers which are granted elsewhere in the statute. It is not an independent grant of power in itself.[108] The authority to make and amend contracts cannot imply the authority to enter into a contract in violation of another section of the same Act or other applicable law, or without a power conferred in another section, just as the power to enter into contracts commonly conferred by corporate charter cannot authorize a corporation to enter into contracts foreign to the purposes of the corporate charter or in violation of law.

In *Dollar* v. *Land*,[109] a case analogous to the present one, this court concluded that § 207 conferred no powers upon the Agency not otherwise specified in the Merchant Marine Act of 1936. In *Dollar* the Maritime Commission

[108] An analogous provision is 15 U.S.C. § 717o (1976), which confers general administrative powers on the Federal Power Commission to "perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of" the Natural Gas Act, Pub.L. No. 75-688, 52 Stat. 821, 830 (21 June 1938), as amended. Courts have universally held that this provision, which is even more specific in conferring powers on the Federal Power Commission than § 207 of the Merchant Marine Act of 1936 is in conferring powers on the Agency, *see* 46 U.S.C. § 1117, does not enlarge the powers of the Commission conferred elsewhere in the Act. *See, e.g., New England Power Co.* v. *Federal Power Commission*, 467 F.2d 425, 430-31 (D.C. Cir. 1972), aff'd, 94 S.Ct. 1151, 415 U.S. 345, 39 L.Ed.2d 383 (1974) (section 717 merely augments existing powers conferred upon Commission by Congress and confers no independent authority to act); *Murphy Oil Corp.* v. *Federal Power Commission*, 431 F.2d 805, 810-11 (8th Cir. 1970) (no enlargement of specific authority of Commission granted in § 717); *Texaco, Inc.* v. *Federal Power Commission*, 412 F.2d 740, 742-43 (3d Cir. 1969) (rulemaking procedural requirements not waived by § 717).

[109] 184 F.2d 245 (D.C. Cir. 1950), *cert. denied*, 344 U.S. 806 (1952).

argued that, upon the authority of § 207, it had power to take title to stock of a steamship company. We stated in that case: [110]

> The power to own and operate transoceanic steamship lines is a power of tremendous scope . . . . It is inconceivable to us that Congress would have left to implication so vast a power. We do not think that if Congress had intended the Maritime Commission to enter upon such ownership and operations it would have left the matter entirely to a clause which merely authorized the Commission to execute contracts.

Similarly, § 207 cannot be a foundation of Agency power to waive statutorily imposed restrictions and thus upset the vital underlying purposes of the Merchant Marine Act, or, indeed, to exercise any power not otherwise granted in the Act or other statute.

C. *Section 1104(a), Title XI, of the Merchant Marine Act of 1936 (46 U.S.C.A. § 1274(a)(3))*

While the Government appellees rely principally upon § 207 as a source of Agency authority, the private party appellees and the trial court rest more strongly upon § 1104(a)(3). The trial court concluded that ". . . [T]he Secretary does in fact possess general authority to accept total . . . [subsidy] repayment in appropriate cases. . . . [T]his authority is expressly contemplated by section 1104(a)(3), 46 U.S.C. § 1274(a)(3). . . ."[111]

The trial court turned to § 1104(a)(3) after finding a "total dearth of guidance from the statutory language and the legislative history [of § 506]," [112] an area in

[110] *Id.* at 249.

[111] *See Shell Oil Co.* v. *Kreps, et al., supra*, 445 F.Supp. at 1134.

[112] *Id.* at 11.

which we have found decisive guidance. Yet § 1104(a)(3) does not deal with the issue of construction-differential subsidy at all. It is not part of Title V, which pertains to such subsidies, but of Title XI, which authorizes Government guarantees of private loans to finance shipbuilding in American yards.[113]

Section 1104(a)(3) was added in 1972 to extend the Agency's authority to make guarantees, and provides that the Secretary:[114]

> . . . may guarantee or make a commitment to guarantee, payment of the principal and interest on an obligation which aids in—
>
> (3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to . . . [Title] V of this . . . [Act].

On its face, this provision gives no authority to repay subsidy, much less to lift any statutory operational restrictions. All it does is provide a means for *financing* repayment, if such repayment is otherwise authorized by statute.

How, when, and by what authority subsidy can be repaid must be found in Title V,[115] not Title XI[116] of the Act. Title V provides for two general conditions under which subsidy may be repaid, and both are found in § 506.[117] The 1938 amendment removed any ambiguity in Title V, and there is no conflict between Title V and

[113] *See* 46 U.S.C. §§ 1271-80 (1970) (Federal Ship Mortgage Insurance).

[114] 46 U.S.C.A. § 1274(a) & 1274(a)(3).

[115] 46 U.S.C. §§ 1151-61 (1970).

[116] 46 U.S.C. §§ 1271-80 (1970).

[117] *See* 46 U.S.C. § 1156 (1970).

§ 1104(a)(3) of Title XI. Nothing in Title XI changes the plain meaning of § 506 of Title V.

Underlying the appellees' and the trial court's rationale that somehow the 1972 amendment to Title XI provides authority to perform an act—the permanent waiver of trade restrictions—which is contrary to the implicit prohibition of § 506 of Title V, in spite of the fact that if such authority were granted we would expect to find it in § 506 and nowhere else, is the failure to recognize that there may be reasons for subsidy repayment completely unrelated to domestic trading. A shipowner might choose to repay subsidies in order to be eligible for refinancing up to 87½% of the vessel's cost,[118] or perhaps to escape U.S.-flag requirements as to manning and other U.S. rules of vessel operation.[119] As we have pointed out before, no party here argues that any section of the Merchant Marine Act prohibits the Agency's acceptance of subsidy repayment, but the Agency's power to waive permanently the § 506 domestic trading restriction is quite another matter.

In summary, § 1104(a)(3) reflects only a congressional understanding that subsidy may be repaid, either under § 506 of Title V or for other reasons unrelated to entry into the domestic trade. It says nothing about authority of the Agency to grant trade restriction waivers.

Strangely, however, the argument of appellees and the rationale of the trial court really do not rest upon the language of § 1104(a)(3) as enacted in 1972, but on

[118] *See* 46 U.S.C.A. § 1274(b)(2).

[119] Such relief could be won by gaining permission from the Agency to engage in foreign-to-foreign trade rather than trade between the United States and foreign countries. *See Shell Oil Co.* v. *Kreps, et al., supra*, 445 F.Supp. at 1134 n.1a.

language which was proposed but *never enacted.*[120] An initial draft of this section in 1971 provided for: [121]

> . . . financing, in whole or in part, [of] the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to Title V of this Act, as amended, [ENACTED] in order to release such vessel from all restrictions imposed as a result of the payment of construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions. [NOT ENACTED]

It is the above language *which was never enacted* which the appellees and the trial court cite as a source of the Agency's present authority to release subsidized vessels from operating restrictions. They reach this conclusion by citing language in the House Report which commented on the deleted language,[122] and by concluding that the *non*enactment shows that the Agency already had such powers and that the 1964 *Grace Line* action was thereby confirmed by a ~~later~~ Congress. Unfortunately for this singularly convoluted line of reasoning, both the House and Senate disclaimed any intention of so doing.

The language of the House Report relied on by the appellees and the trial court reads as follows: [123]

> In the entire history of the administration of the 1936 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special circumstances, could have called into play the provisions of this paragraph. Your committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act. Your Committee has therefore amended the legislation by deleting the language [specifying the conditions under which repayment could be accepted and trade restrictions waived]. . . .

[120] *See id.* at 1137; Brief for Seatrain and Polk Tanker, *supra* note 15, at 16-17; Brief for Secretary of Commerce and Other Federal Appellees at 43-45.

[121] H.R. 9756, 92d Cong., 1st Sess., § 3 (1971).

[122] H.R. Rep. No. 92-688, 92d Cong., 1st Sess. (1971).

[123] *Id.* at 10.

There are several points vitiating the reliance of the appellees and the trial court on this language. First, it is clear that the Committee regarded the *Grace Line* case as a "very special circumstance[e]" and "an unusual situation," [124] and chose the path of leaving such matters entirely to the courts rather than enshrining any principle in general legislation. So the Congress specifically declined to adopt the Agency's *Grace Line* action as a general principle. As aptly stated by one appellant here, "The most that can be said about the . . . [intent of Congress in 1972 is that it] declined to commit itself on the issue." [125]

Second, the language of § 1104(a)(3) refers specifically to subsidy repayments under Title V.[126] Yet the only types of domestic trade restriction waivers authorized calling for subsidy repayments under Title V are

[124] *See id.*

[125] *See* Brief for Alaska Bulk and Trinidad, *supra* note 8, at 27.

[126] *See* 46 U.S.C.A. § 1274(a)(3) (providing for ". . . financing [of] . . . the repayment . . . of construction-differential subsidy paid . . . pursuant to . . . [Title V]. . . .").

those cited in § 506, which are limited to certain world voyages embracing ports in the U.S. coastwise trade and to temporary periods not to exceed six months.[127]

Third, and most importantly, the House Committee Report quoted above contains a sentence following the portion quoted and relied upon by the trial court, which the trial court omitted. That sentence reads: "This paragraph [§ 1104(a)(3)] in Title XI does not in any way extend or affect the application of Title V of the Act."[128] The Senate Report contained the same language omitted by the trial court:[129]

> Paragraph (3) [of § 1104(a)] is new. This paragraph would permit the Secretary of Commerce to guarantee an obligation which aids in financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy pursuant to Title V of the Act. *This paragraph in Title XI does not in any way extend or effect the application of Title V of the Act.*

Nothing whatever was said in the Senate Committee report about the *Grace Line* matter or authorizing waiver of domestic trade restrictions.

The bottom line of the legislative history of § 1104(a)(3) in both House and Senate is clear: "This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act." We think that no inference of reaffirmed or expanded waiver authority can be drawn from either the congressional action or the Reports with regard to § 1104(a)(3). Congress plainly refused to ratify the *Grace Line* action or to permit

[127] *See* 46 U.S.C. § 1156 (1970).

[128] H.R. Rep. No. 92-688, 92d Cong., 1st Sess. 10 (1971).

[129] S. Rep. No. 92-1137, 92d Cong., 2d Sess. 9 (1972) (emphasis added).

the enactment of § 1104(a)(3) to change Title V as the statutory section determining exclusively the circumstances under which subsidy can be repaid in exchange for a lifting of trade restrictions.

V. Policy of the Merchant Marine Act of 1936

In *Sea-Land Service, Inc.* v. *Kreps*,[130] a case involving the award of operating-differential subsidy under Title VI of the Merchant Marine Act of 1936,[131] we indicated that when "[t]he relevant statutory language provides no direct guidance in resolving . . . [a] dispute" over that statute's proper application, both the Agency and the reviewing court "must of necessity look to the *purposes* underlying the particular statutory provision and the Act in general . . . ."[132] It should be clear that in the present case we believe there is much guidance to be derived from the language of the statute itself, particularly § 506 of Title V. In addition to this, we now turn to consider whether the Agency's interpretation of the statute on which its action in the instant case is based will in the long run further the purposes of the legislation in a reasonable and sound manner.

We believe there is risk of harm to the overall and long-term policies of the Merchant Marine Act in sustaining the Agency action here. The policy of the Act is to create a protected area of purely American shipbuilding and ship operation in the domestic coastwise trade. This is accomplished by excluding all foreign-built or foreign-operated vessels from this trade. The American shipowner and shipbuilder then knows that he must compete only with like-situated American shipowners and shipbuilders, and he can adjust his sights

[130] 566 F.2d 763 (D.C. Cir. 1977).

[131] 46 U.S.C. §§ 1171-83a (1970).

[132] *Sea-Land Service, Inc.* v. *Kreps*, *supra*, 566 F.2d at 773.

accordingly. On the basis of known economic facts, the builder or operator makes his calculations of the market and of competition, in which the Government plays no direct part, except in administering guarantees of construction loans available equally to all.

The American shipowner and shipbuilder competes in foreign trade on an entirely different economic footing. To compete with foreign shipping, the American builder and operator are able to secure up to 50% of a ship's construction costs from the U.S. Government. The purpose of this policy is to enable the American operator to compete initially with foreigners on an equal basis of cost per ship, and to sustain the viability of American shipyards. The American operator is further aided by an operational-differential subsidy, which compensates him for the recognized extra cost of American crews. The American shipbuilder and operator know the competitive factors present in the foreign trade, and they are assisted by U.S. Government funds in meeting foreign competition.

Given these two completely separate competitive areas, unsubsidized American vessels have always operated in the protected, Jones Act domestic trade, while subsidized American vessels, in accord with the restriction of § 506, have always operated in the foreign trade.[133] To permit a ship heavily subsidized in its construction cost to compete with unsubsidized U.S.-built ships is to introduce into the domestic portion of our maritime trade a totally variable and incalculable factor. While the Government may feel that it should be able to take whatever action is necessary to free itself of its unfortunate financial obligations here, and though indeed there may be public (but not maritime) policy arguments strongly in its favor, yet the transfer of, first, the *Stuyvesant* and pos-

[133] The two Grace Line vessels may be the only possible exceptions. *See* pp. 32-39 & notes 59-36 *supra*.

sibly later of the Bay Ridge[134] into the domestic trade would inevitably have a depressive impact on the future of American shipbuilding and ship operation by American owners. To accomplish a short-term Government goal, the actions of the Agency here would imperil a carefully conceived, long-established, and far-sighted maritime policy of the United States.

Conclusion

We find the Agency's action unauthorized by any applicable statute, prohibited by § 506 of the Merchant Marine Act of 1936, and contrary to the overall congressional policy expressed in the structure of that Act. The decision of the District Court is reversed, and the case is remanded to the District Court with instructions to enter an appropriate order granting the plaintiff-appellants the relief requested.

Reversed and Remanded.

[134] The *Bay Ridge* was under construction in the Brooklyn Naval Yard at the same time as the *Stuyvesant*. *See* Brief for the Secretary of Commerce and Other Federal Appellees at 15-16.

BAZELON, *Circuit Judge, dissenting*: Although the majority gives a plausible account of the statutory framework governing this case, I am persuaded that nothing in the Merchant Marine Act precludes the Secretary from waiving domestic trading restrictions in return for total repayment of subsidy. In my view, the Secretary had ample authority to enter into the contractual modification at issue in this case, and in exercising that authority she did not abuse her discretion. I therefore respectfully dissent from the decision to reverse the district court.

I.

I cannot agree that the 1938 Amendments to the Merchant Marine Act of 1936 "unmistakeably manifested" [1] Congress' intention to preclude total repayment of the construction differential subsidy in return for a permanent waiver of the domestic trading restrictions contained in § 506 of the Act. The Report of the House Committee on Merchant Marine and Fisheries observed that "[n]o fundamental change . . . has been effected" in § 506 by the 1938 Amendments.[2] The original version of § 506 was part of Congress' effort to strengthen the American built and operated "foreign-going" fleet through the creation of a "construction differential subsidy," which replaced the much abused "ocean mail contract subsidy" program. One of the principal failures of the ocean mail subsidy was the diversion of subsidy payments from foreign to domestic service, providing the subsidized operators an unfair advantage over the unsubsidized, "Jones Act" operators.[3]

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[1] Majority Op. at 28.

[2] H.R. REP. No. 2168, 75th Cong., 3d Sess. 21 (1938).

[3] *See*, Preliminary Report of the Special Committee of the Senate to Investigate Air Mail and Ocean Mail Contracts. S. REP. No. 898, 74th Cong., 1st Sess. 1933.

The 1936 Act eliminated much of the unfair competition by restricting the conditions under which a ship built with a construction subsidy could engage in the domestic trade. At the heart of the original § 506 was the requirement that owners of subsidized vessels must repay a portion of the construction differential subsidy corresponding to the remaining economic life of the vessel in order to engage in direct competition with the unsubsidized, Jones Act fleet.[4]

The remaining text of § 506, however, introduced a central ambiguity into the operation of the section, an ambiguity that led to the 1938 amendment.[5] The original § 506 could be read to permit permanent waiver of the domestic trade restrictions, contingent on proportional

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[4] P.L. 74-835, 40 Stat. 1999 (1936), the original § 506 provided *inter alia*:

> It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: *Provided*, That no operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months.

[5] *See* note 3, *supra*.

repayment of subsidy, as well as "emergency" temporary waiver of restrictions without the need to pay back any of the construction differential subsidy. Alternatively, the section could be read to permit only temporary waivers, coupled with the requirement of payback.

As Judge Wilkey notes, the former is the more plausible interpretation of the original § 506.[6] Accordingly, the "original purpose" of § 506 included the possibility of permanent waiver so long as the source of unfair competition, the previously granted construction differential subsidy, was eliminated. In contrast, the ability to secure emergency temporary waivers without the required payback of subsidy did provide operators of subsidized vessels a significant advantage over their Jones Act competitors. It therefore seems likely that Congress was addressing this latter situation when clarifying the "original purpose" of § 506. Congress clearly eliminated the temporary waiver advantage, since the amended § 506 clearly requires a payback of subsidy for even temporary transfers.

Nonetheless, it is undeniable that in eliminating the 3-month temporary transfer for which no subsidy need be repaid, Congress also eliminated from § 506 the language that appeared to authorize permanent transfer from foreign to domestic service. Despite its expressed intention not to alter the "original purpose" of the section, the House Report stated:

> The section has been entirely rewritten in order to remove ambiguities arising from the method of describing the services other than foreign. . . . If the vessel is used, with the consent of the Commission, in the domestic trade in services other than those

[6] Majority Op. at 24.

> enumerated, *the obligations of the owner to repay part of the subsidy are clearly defined.*[7]

The clearly defined obligation of the amended § 506 includes partial, but not permanent repayment of subsidy. Yet nowhere in the legislative history is there any indication that permanent waivers, apparently permissible under the 1936 Act, were expressly considered and eliminated in 1938.[8]

II.

In 1964, the Comptroller General issued his decision in *Grace Line*[9] upholding the Secretary of Commerce's au-

[7] H.R. REP. No. 2168, *supra*, note 2, at 21 (emphasis added).

[8] Compare Majority Op. at 29. The discussion of the amendment to § 506 was sparse. In addition to the above-discussed House Report, reference to the amendment was limited to: 1) a brief similar comment in the Senate Report, S. REP. No. 1618, 75th Cong., 3d Sess., 12-13 (1938), *quoted in pertinent part* in Majority Op. at 27 n.52; 2) the comment of Maritime Commission Chairman Joseph P. Kennedy in introducing the 1938 Amendments, *see Amending Merchant Marine Act, 1936, hearings on H.R. 8532 before the House Committee on Merchant Marine and Fisheries*, 75th Cong., 2d Sess. 8 (1938) *quoted in* Majority Op. at 25-27; and 3) the testimony of E. M. Bull (president of an unsubsidized carrier), *id.* at 251-258; John T. Corbett (representing the Brotherhood of Locomotive Engineers), *id.* at 571-72; and Edgar F. Luckenbach (president of an unsubsidized carrier), *id.* at 105-06. Although none of the comments can be fairly characterized as resolving the question before this court, it is instructive that the comments of the unsubsidized operators, Bull and Luckenbach, generally criticized the amendments as extending rather restricting the right of subsidized operators to compete with the unsubsidized vessels. The failure of these witnesses to comment favorably on the apparent elimination of the right to transfer permanently may be some indication that eliminating the permanent waiver was not intended. Alternatively, their failure to address permanent transfer may suggest that the prospect of a permanent waiver accompanied by repayment of subsidy was not viewed as a threat to domestic, unsubsidized carriers. It is clear from the testimony that the principal concern of the unsubsidized operators was the ability of subsidized ships to move back and forth between foreign and domestic service, enjoying the benefits of subsidy on their foreign voyages and entering the domestic service only on the choicest routes and occasions. Permanent transfer does not pose similar problems.

[9] 44 Comp. Gen. 180 (1964).

thority to remove domestic trading restrictions in return for repayment of the unamortized construction differential subsidy. Although there are some factual differences between the present case and *Grace Line*, I do not believe that they are material to the question of the Secretary's authority, since the action taken in *Grace Line* was not contemplated by the express language of § 506 any more clearly than the present action of the Secretary.

I find the Comptroller's rationale in *Grace Line* questionable. The Comptroller's reasoning began with the observation that ships built with subsidy would be permitted to engage in domestic activities without restriction once the subsidy had been fully depreciated. In the Comptroller's view, this represented a congressional judgment that when the unfair advantage created by the subsidy terminated, the reasons for the restriction would expire, thus justifying unrestricted domestic trading by previously subsidized vessels. Applying the same reasoning to an "accelerated amortization" through repayment, the Comptroller concluded that the purpose of the restrictions would lapse upon repayment, and the Secretary could then permit domestic trading, consistent with the Act.

The difficulty with this argument is that the statute explicitly contemplates a subsidized ship entering unrestricted domestic trade after the economic life of the subsidized vessel had expired, without any further repayment of subsidy.[10] In contrast, no such explicit provisions governs "accelerated" amortization.

Although *Grace Line* thus does not stand as well-reasoned precedent, it is precedent nonetheless, and appel-

[10] P.L. 88-225, 77 Stat. 469 (1963), 46 U.S.C. § 1125 (note) (1970), amended the basis for computing the amount of subsidy to be repayed pursuant to § 506. Application of that formula yields a zero repayment once the subsidy has been fully depreciated.

lees argue that subsequent congressional actions represent ratification of at least the result in *Grace Line*.

In 1970, Congress enacted a number of amendments to the Merchant Marine Act designed to promote American ship-building for the foreign trade, but § 506 was left intact.[11] However, Congress' failure to amend § 506 under those circumstances cannot be viewed as a ratification of *Grace Line*, since the issue of transfer from the foreign to domestic trade was not germane to the principal focus of the Amendments.

A stronger case can be inferred from Congress' amendment in 1972 of § 1104 of the Merchant Marine Act.[12] As introduced, the new § 1104(a)(3) clearly contemplated the release of the domestic trading restrictions in return for full repayment of subsidy. The House Committee however, deleted the explicit reference to repayment in return for lifting the trading restrictions, observing:

> In the entire history of the administration of the 1938 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special circumstances, could have called into play the provisions of this paragraph. Your committee questions the desirability of general legislation to deal with such an unusual situation and feels that Title XI assistance should be extended in all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act. Your committee therefore has amended the legislation by deleting the language.[13]

[11] Merchant Marine Act of 1970, P.L. 91-469, 84 Stat. 1018 (1970).

[12] Federal Ship Financing Act of 1972, P.L. 92-507, 86 Stat. 909 (1972).

[13] H.R. REP. No. 72-688, 92d Cong., 1st Sess. 9-10 (1971).

There are three items of note in the quoted passage. First, Congress showed a clear awareness of the *Grace Line* precedent. Second, by characterizing the purpose of the language so as "to include" partial repayments, Congress intended that other types of repayment might occur.[14] Finally, Congress indicated that the enactment of § 1194(a)(3) was not, in its view, an alteration of Title V. Thus, whether or not such repayments were intended must be gauged by the Act as it stood prior to 1972. But in judging what restrictions Title V imposed prior to 1972, we must take into account Congress' awareness of *Grace Line* as an interpretation of Title V.

I have little doubt that in enacting the 1972 Amendments the House Committee clearly contemplated the use of § 1104(a)(3) loans for precisely the sort of repayment of subsidy at issue in *Grace Line* and here, albeit with the expectation that full repayment would be rare. There is no note of disapproval in the House Committee's discussion of *Grace Line*. A fortiori, the House Committee must have believed the Secretary had the *authority* to accept repayment in return for waiving domestic trading restrictions, and that Title V posed no barrier to such an arrangement.

III.

This result is perfectly consistent not only with the overall purposes of the Act (fostering the development of a U.S.-flag, U.S.-built merchant marine) but is equally consistent with the purpose of the trading restrictions

[14] Admittedly, the fact that full repayment was contemplated by the 1972 amendments is not in itself sufficient to establish Congressional approval of removing domestic trading restrictions in return for that repayment. There are other reasons why an operator might seek to repay the subsidy. For example, the operator might seek the right to engage in foreign-to-foreign, rather than foreign-to-U.S. trade, with the attendant relief from U.S. flag requirements. Alternatively, repayment of subsidy would make the operator eligible to secure financing of up to 87½% of the cost of the vessel.

imposed by § 506. Unlike the temporary transfers, a permanent transfer does not allow the vessel's operator to take advantage both of the benefits of subsidy in foreign trading, and the protection of the Jones Act in domestic trading. Full repayment of subsidy irrevocably places the transferred vessel on the same footing as all other ships in the Jones Act fleet, without affording an unfair advantage to the previously subsidized operator.[15] The only conceivable harm to the Jones Act operators is an increase in competition from an additional U.S.-flag, U.S.-built vessel. I do not believe it is the purpose of § 506 in particular, or the Merchant Marine Act as whole, to protect Jones Act operators from this type of competition.[16]

The fact that the 92nd Congress thought that § 506 did not preclude removal of domestic trading restrictions in return for full repayment does not conclusively

[15] To the extent that the Secretary did not require a repayment of subsidy *with interest*, the owners of the STUYVESANT did receive an unfair advantage. Accordingly, I would modify the decision of the district court to require the amount of repayment to include interest on the subsidy.

[16] This raises an interesting question of appellants' standing to challenge the Secretary's decision. The issue of standing is not addressed in Judge Wilkey's opinion. I take it that the only "injury in fact" which appellants can allege is the harm from additional competition. Although I believe this is an adequate basis for appellants' standing, *see* Ass'n of Data Processing Organizations, Inc. v. Camp, 397 U.S. 150 (1970), it demonstrates that appellants are concerned primarily with insulating their vessels from competition. Although the nation's merchant marine policy does shield domestic carriers from competition by foreign built vessels, as well as from unfair competition by subsidized vessels, it was not intended to limit the competition among American built, unsubsidized vessels. Appellant Shell argues that "[p]ersons planning to construct unsubsidized vessels must be able to assess future vessel supply in the legislatively protected domestic market." Reply Br. for Shell at 3. This mischaracterizes the protection created by the Jones Act and § 506, since the builder of an unsubsidized vessel has no way of knowing how many other unsubsidized vessels might be built in the future.

end our inquiry. Although the views of subsequent Congress' are entitled to significant weight, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974), where the intent of the enacting Congress is unmistakable, it is the latter that controls, unless expressly overriden by the positive act of a later Congress. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 354 n. 39 (1977). The difficulty posed by this case is, on the one hand, the original intent is not unmistakable (as in *Teamsters*) but, on the other hand, the intention of the later Congress was not embodied in legislation directly affecting the ambiguous provision, that is, Title V.

Although the matter is not free from doubt, I would affirm the decision of the district court, subject to the qualification expressed in note 15, *supra.*[17] My conclusion is buttressed by the language in both §§ 501 and 504 of the Act, 46 U.S.C. §§ 1151 and 1154 (1970), that "[t]he contract of sale . . . shall not restrict the lawful or proper use or operation of the vessel except to the extent *expressly* required by law." (emphasis added) Taking all the relevant guides to interpretation together, I cannot say that the Secretary's interpretation is unreasonable. *See Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965), nor that there are "compelling indications" that her interpretation is wrong, *see E.I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977); *Columbia*

[17] Assuming that § 506 does not *preclude* full repayment of subsidy in return for removing domestic trading restrictions, I believe the Secretary has the authority, pursuant to § 207 of the Act, 46 U.S.C. § 1117 (1970) to amend the contract to remove the domestic trading restrictions. The Secretary has recognized that her discretion to do so is not unlimited, *see* the Secretary's proposed rule, *Construction-Differential Subsidy Repayment, Total Repayment Policy*, 43 Fed. Reg. 51045 (1978) (to be codified in 46 C.F.R. § 276.3), and must be exercised consistent with the overall purposes of the Act.

Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94, 121-22 (1973).

Despite the statement of counsel for the Secretary at oral argument, I do not believe the question of whether the Secretary must make a finding of necessity for a full repayment is relevant to the Secretary's authority to accept such repayment, since full repayment is not expressly covered by 506.[18] A finding of need is mandated by § 506 for *partial repayment* and *temporary transfer*. This is consistent with a concern that subsidized carriers not take unfair advantage of unsubsidized carriers simply to skim off the most lucrative domestic trade and return at will to foreign service. In contrast, full repayment places the formerly subsidized carrier on an equal footing with the other vessels in the Jones Act fleet, and the possibilities of abuse are thereby eliminated. Nonetheless, the Secretary cannot arbitrarily agree to accept repayment, but rather must provide a reasoned basis for that action. The circumstances of this case provide ample support for the Secretary's discretionary decision to accept repayment.

[18] Compare Majority Op. at 16-19.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1978

No. 77-2080

ALASKA BULK CARRIERS, INC., TRINIDAD CORPORATION, APPELLANTS

v.

JUANITA M. KREPS, SECRETARY OF COMMERCE, U. S. DEPARTMENT OF COMMERCE, ET AL.

And Consolidated Case Nos. 78-1211, 78-1212 and 78-1281

(Filed March 22, 1979)

BEFORE: BAZELON, MCGOWAN, and WILKEY, *Circuit Judges*

ORDER

Upon consideration of the petitions for rehearing filed by appellees/cross appellants (Seatrain Shipbuilding Corp., et al.) and appellees (federal), it is

ORDERED, by the Court, that the aforesaid petitions for rehearing are denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge Bazelon would grant the petitions for rehearing.

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And Consolidated Case Nos. 78-1211, 78-1212 and 78-1281

(Filed March 22, 1979)

BEFORE: WRIGHT, *Chief Judge*; BAZELON, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB, and WILKEY, *Circuit Judges*

ORDER

Upon consideration of the suggestions for rehearing *en banc* filed by appellees/cross appellants (Seatrain Shipbuilding Corp., et al.) and appellees (federal), having been transmitted to the full Court and a majority of the judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, that the aforesaid suggestions for rehearing *en banc* are denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge Bazelon would grant the suggestions for rehearing *en banc*.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

SHELL OIL COMPANY,
Plaintiff,

v.

JUANITA M. KREPS et al.,
Defendants.

ALASKA BULK CARRIERS, INC., and
TRINIDAD CORPORATION,
Plaintiffs,

v.

JUANITA M. KREPS et al.,
Defendants.

Civ. A. Nos. 77-1645, 77-1647

Nov. 22, 1977

As Corrected March 6, 1978

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

These consolidated cases are presently before the Court on cross-motions for summary judgment.[1] Plaintiffs herein, Shell Oil Company (Shell), Alaska Bulk Carriers,

[1] Defendants and defendant-intervenors have, in the alternative, moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. However, because the Court has considered matters outside the pleadings, the Court has, pursuant to the last sentence of Fed.R.Civ.P. 12(b), treated defendants' and defendant-intervenors' motions solely as motions for summary judgment pursuant to Fed.R.Civ.P. 56.

Inc. (Alaska Bulk), and Trinidad Corporation (Trinidad), seek judicial review of certain actions taken by the defendants, Juanita M. Kreps, Secretary of Commerce, the Maritime Administration (MarAd), Robert J. Blackwell, Assistant Secretary of Commerce for Maritime Affairs, and the three members of the Maritime Subsidy Board (MSB). The actions challenged relate to the Secretary's decision to remove domestic trading restrictions from the ship known as the S. S. STUYVESANT in exchange for the repayment of a construction-differential subsidy (CDS) of some $27.2 million by the Polk Tanker Corporation (Polk), the owner of the STUYVESANT and a wholly-owned subsidiary of Seatrain Lines, Inc. Polk and Seatrain Shipbuilding Corporation (Seatrain Shipbuilding), the builder of the STUYVESANT and another wholly-owned subsidiary of Seatrain Lines, Inc., were permitted to intervene herein as party-defendants.

The cross-motions for summary judgment now before the Court present four legal issues: (1) whether the Secretary has the legal authority under the Merchant Marine Act of 1936 to remove domestic trading restrictions upon the operation of a vessel built with CDS in exchange for repayment in full of the CDS; (2) if the Secretary has such legal authority to remove domestic trading restrictions, whether she has the legal authority to accept as repayment therefor a promissory note payable over 20 years; (3) whether the procedures utilized by the Secretary in taking the actions here in issue deprived plaintiffs of property in violation of the Due Process Clause of the fifth amendment; and, finally, (4) whether the Secretary's decision to exercise such authority on the facts of the instant case was arbitrary and capricious or otherwise violative of the Administrative Procedure Act (APA).

For the reasons hereinafter stated in sections III and IV, *infra*, the Court concludes that the Secretary has the

legal authority both to remove permanently domestic trading restrictions from a CDS vessel in exchange for CDS repayment and to accept a 20-year promissory note as repayment. The Court further concludes that the procedures utilized by the Secretary did not deprive plaintiffs of any property interest cognizable under the Due Process Clause. Accordingly, the Court will grant defendants' and defendant-intervenors' motions for summary judgment as to these issues. However, for the reasons set forth in section V, *infra*, the Court concludes that the Secretary failed to consider relevant factors in making her decision to take the actions herein challenged, and the Court therefore concludes that these actions are arbitrary and capricious and an abuse of discretion, within the meaning of section 10(e) of the APA, 5 U.S.C. § 706(2)(A). Accordingly, the Court will grant plaintiffs' motion for summary judgment on this issue, and will remand this matter to the Secretary for further consideration in accordance with this opinion.

I. STATUTORY FRAMEWORK

Title V of the Merchant Marine Act of 1936, (the Act), *as amended*, 46 U.S.C. §§ 1151 *et seq.*, empowers the MSB to award a "construction-differential subsidy" (CDS) to persons building new vessels for use in the "foreign commerce of the United States." 46 U.S.C. § 1151(a). Such a subsidy is intended to equalize the costs of vessel construction between United States and foreign shipyards, where construction costs are lower as a result of lower labor and material costs and/or foreign government subsidies. The CDS program thus enables ships built in the United States to compete in charter rates against foreign-built ships. *See generally Moore-McCormack Lines, Inc.* v. *United States*, 413 F.2d 568, 188 Ct.Cl. 644 (1969).

No such CDS, however, is necessary for ships not in competition with foreign-built ships. Section 27 of the

Merchant Marine Act of 1920, *as amended*, 46 U.S.C. § 883, provides that only vessels "*built in* and documented under the laws of the United States and owned by persons who are citizens of the United States" may engage in domestic trade—trade "between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwide laws." (Emphasis added.) *See American Maritime Association* v. *Blumenthal*, No. 77-1508 (D.D.C. October 14, 1977). Since no foreign-built ships can compete in domestic trade with the higher-cost United States-built ships, no CDS may be paid to United States ships engaged in domestic trade.

In order to protect the unsubsidized vessels, United States ships that are built with the aid of CDS are prohibited from engaging in domestic trade since they are able to offer lower charter rates than unsubsidized United States ships. This prohibition, codified in section 506 of the 1936 Act, 46 U.S.C. § 1156, is the focal point of this litigation. This section, quoted in its entirety in section III(b) *infra*, requires recipients of CDS to agree not to operate the subsidized vessel in domestic commerce, though it does provide a mechanism whereby the Secretary can waive such domestic trading restrictions for up to six months per year in exchange for a *pro rata* repayment of CDS.

One final statutory provision of relevance to this case is Title XI of the Act, 46 U.S.C. §§ 1271 *et seq.*, which authorizes the Secretary to provide loan guarantees for the financing of United States-built vessels. Section 1104(a)(3) of the Act, 46 U.S.C. § 1274(a)(3), authorizes the use of such guarantees for the "financing, in whole or in part, [of] the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of the Act." Other subsections of section 1104(a) set forth other types of financing for which loan guarantees may be made. Section 1104(b)(2) provides that such financing may not exceed 87.5 percent of the cost of vessels constructed without CDS and may not exceed 75 per cent of the cost of vessels constructed with CDS.

II. FACTUAL BACKGROUND

On June 30, 1972, the MSB executed CDS contracts with intervenors Seatrain Shipbuilding and Polk for a 225,000 deadweight ton (DWT) tanker now known as the STUYVESANT. Pursuant to Board Contract Nos. MA/MSB-164 and MA/MSB-165, the MSB agreed to pay CDS funds to Seatrain Shipbuilding, and Polk, as the vessel purchaser, agreed to operate the STUYVESANT in the foreign trade of the United States, as required by section 506 of the Act.

Pursuant to the CDS contracts, Seatrain received $27.2 million in construction subsidies for the STUYVESANT which represents approximately 26 per cent of the total construction cost of some $102.7 million. In addition, pursuant to Title XI of the Act, the Secretary guaranteed some $30.2 million in loans. Finally, the Economic Development Administration (EDA), another agency of the Department of Commerce, made loans of $5 million and guaranteed, to the extent of 90 per cent, approximately $82 million in additional loans to Seatrain Shipbuilding for the purpose of developing and maintaining the shipbuilding facilities of the former Brooklyn Navy Yard.

Construction of the STUYVESANT was completed in 1977. Efforts by Polk to find employment for the STUYVESANT in the foreign trade of the United States proved unavailing as a result of an excess supply of tanker tonnage in foreign trade and other factors influencing the volume of such foreign trade. As a result, Polk sought other employment opportunities for the STUYVESANT and began negotiations with the Stand-

ard Oil Company of Ohio [(SOHIO)] for the transportation of SOHIO's Alaskan oil to the continental United States. These negotiations culminated on June 21, 1977, in an agreement between Polk and SOHIO for a three-year time charter of the STUYVESANT provided that the vessel became qualified to engage in domestic trade.

On July 8, 1977, in order to so qualify the STUYVESANT for carrying SOHIO's Alaskan oil in domestic trade, Polk filed with the Assistant Secretary of Commerce for Maritime Affairs (hereinafter, MarAd/MSB) an application seeking waiver of the domestic trade restrictions of section 506 for a three-year period in exchange for a *pro rata* repayment of CDS. MarAd/MSB assigned the application Docket No. S-565, and notice of the application was published in the Federal Register on July 19, 1977. 42 Fed.Reg. 37,229 (1977). Plaintiffs Shell and Alaska Bulk and others filed comments in opposition to Polk's application, and Polk subsequently withdrew the application on August 26, 1977.

On August 25, 1977, Polk had filed a second application with MarAd/MSB. This application requested the Secretary and her designees to amend the CDS contract with Polk to permit Polk to repay in full the CDS already paid for the STUYVESANT in exchange for the removal of the section 506 domestic trading restrictions to which Polk had agreed. As stated in Polk's August 25 application itself, the purpose of this requested "[c]ancellation of the Title V contract" was to "permit the operation of the Vessel in the Alaska (domestic) trade without further permission from the United States." Exhibit D, Stipulation of Undisputed Facts, at 1. This application by Polk was not published in the Federal Register.

On August 30, 1977, MarAd/MSB took a series of actions with respect to the August 25, 1977, application of Polk; these actions are set forth in two letters dated

August 31, 1977, from MarAd/MSB to Polk and Queensway Tanker, Inc. In these letters, MarAd/MSB agreed, *inter alia*, to release the STUYVESANT permanently from section 506 domestic trading restrictions in exchange for Polk's repayment of the $27.2 million CDS by means of a 20-year interest-bearing promissory note secured by a third preferred ship mortgage on the vessel. In addition, MarAd/MSB approved the following transactions and attendant sale of Title XI-guaranteed bonds, which were in fact consummated on September 30, 1977. At closing, Polk transferred the STUYVESANT to the United States Trust Company (USTC) as owner-trustee for the equity-owner, General Electric Credit Corporation (GECC) and the above-described collateralized promissory note to the Secretary for $27.2 million as repayment for the full amount of CDS. The note was then transferred to USTC which assumed responsibility for $60.2 million of government-insured indebtedness on the STUYVESANT. Of that amount, $31.3 million is indebtedness incurred at the closing through the sale of bonds. The proceeds of these bonds was then used to repay loans of $28 million guaranteed by the Economic Development Administration. USTC also paid Polk $32.6 million, which was placed in an escrow account for the benefit of the equity-owner, GECC. USTC then bareboat-chartered the STUYVESANT to Queensway Tankers, Inc., which in turn time-chartered the vessel to SOHIO for three years for the purpose of transporting Alaskan oil to the continental United States.

The above-described transactions, of which the Secretary's decision to remove domestic trading restrictions upon the STUYVESANT was an integral part, were originally scheduled for closing on September 23, 1977. But on September 22, 1977, plaintiffs filed these suits and sought a temporary restraining order (TRO) to prevent the scheduled closing. The parties appeared before Judge Gasch on that date, and he granted the requested

TRO and scheduled the hearing on plaintiffs' motion for a preliminary injunction for September 29, 1977, before this Court.

On September 29, 1977, this Court heard extensive arguments on plaintiffs' motion for preliminary injunctive relief. Upon consideration of these arguments and the parties' comprehensive memoranda, and based on its consideration of the four factors enunciated in *Virginia Petroleum Jobbers Association* v. *FPC*, 104 U.S.App. D.C. 106, 259 F.2d 921 (1958), the Court found that plaintiffs had failed to demonstrate that they would incur immediate and irreparable injury if the requested relief were denied. The Court therefore, on September 30, 1977, denied plaintiffs' motion for a preliminary injunction. Thereafter, on that same day, the financial transactions involving the STUYVESANT were closed. Since that time, the parties have engaged in extensive and expedited discovery, and, as a result, they have filed the instant cross-motions for summary judgment.

III. THE SECRETARY OF COMMERCE HAS AUTHORITY UNDER THE MERCHANT MARINE ACT OF 1936 TO ACCEPT TOTAL REPAYMENT OF CONSTRUCTION-DIFFERENTIAL SUBSIDY AND TO WAIVE PERMANENTLY DOMESTIC TRADING RESTRICTIONS IN EXCHANGE FOR SUCH REPAYMENT.

The threshold issue before the Court is whether the Secretary has authority to accept total repayment of CDS in exchange for the removal of the domestic trade restrictions imposed by section 506 of the Act, 46 U.S.C. § 1156. Resolution of this issue requires this Court to determine first whether the Secretary has the general authority to accept total repayment of CDS after the subsidy contract has been executed and second, whether

section 506 bars the Secretary from removing domestic trade restrictions in exchange for such total repayment.

A. *The Secretary's General Contractual Authority*

All parties appear to be in agreement that the Secretary possesses a "general authority" to accept total repayment of CDS. Thus, plaintiffs Alaska Bulk and Trinidad state unequivocally that they "have no quarrel with [the acceptance of] total CDS repayment" as long as such acceptance is not accompanied by a removal of domestic trade restrictions.[1a] None of the parties, however, has pointed to any particular statutory provision(s) that expressly authorizes the Secretary to accept total CDS repayment under any circumstances.

Defendants and defendant-intervenors have asserted that this power is *inherent* in sections 504, 1104(a)(3), and 207 of the Act, 46 U.S.C. §§ 1154, 1274(a)(3), & 1117, and in section 105(1) of the Reorganization Plan No. 21 of 1950 [Plan 21], 64 Stat. 1273 (1950), and section 202(b)(1) of Reorganization Plan No. 7 of 1961 [Plan 7], 75 Stat. 840 (1961). While plaintiffs admit, as indicated above, that the Secretary has such inherent authority to accept total CDS repayment except when such repayment is barred by another provision of the Act, they express neither agreement nor disagreement with the provisions relied upon by defendants and defendant-intervenors.

The Court has carefully analyzed the provisions invoked by defendants and defendant-intervenors. On the

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[1a] Reply Memorandum of October 20, 1977, at 5 n.5. Plaintiff Shell adopts this same position in its Memorandum of October 13, 1977, at 24 n.*. As two examples of "permissible" CDS repayment, plaintiffs cite: (1) CDS repayment for the purpose of obtaining 87½% Title XI financing under 46 U.S.C. § 1274(b)(2), rather than 75% financing; and (2) CDS repayment for the purpose of obtaining permission to engage in foreign-to-foreign trade, rather than trade between the United States and foreign countries.

basis of this analysis, the Court concludes that the Secretary does in fact possess general authority to accept total CDS repayment in appropriate cases. The Court agrees with defendants and defendant-intervenors that such authority is inherent in the Secretary's broad contractual authority provided by sections 504 and 207, 46 U.S.C. §§ 1154 and 1117. The Court further agrees that this authority is expressly contemplated by section 1104 (a) (3), 46 U.S.C. § 1274(a) (3), which provides that the Secretary

> may guarantee or make a commitment to guarantee, payment of the principal and interest on an obligation which aids in—
>
> > (3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to [Title V].

Finally, the Court also finds that the two reorganization plans cited by defendants and defendant-intervenors demonstrate that the Secretary of Commerce has authority not only for making Title V [CDS] subsidy contracts, but also, in the words of section 105(1) of Plan 21, for "amending and terminating [such] contracts." While these reorganization plans cannot be interpreted to "authoriz[e] an agency to exercise a function which is not expressly authorized by law at the time the plan is transmitted to Congress," 5 U.S.C. § 905, they nevertheless demonstrate (1) that the Secretary's broad contractual authority with respect to CDS contracts has been construed expansively, and (2) that Congress was aware of, and approved, at least implicitly, such an expansive construction. For these reasons, the Court holds that the Secretary has authority to accept total CDS repayment under appropriate circumstances.

B. *The Effect of Section 506*

Plaintiffs contend that, notwithstanding any general authority which the Secretary may have, section 506 precludes any removal, or waiver, including a permanent one, of domestic trade restrictions *except* for the six-month waivers expressly authorized by this section. Section 506 provides:

> Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic Coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Secretary of Commerce that proportion of one-twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. *The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this chapter.* Such consent shall be conditioned upon the agreement by the owner to pay to the Secretary, upon such terms and conditions as he may prescribe, an amount which

> bears the same proportion to the construction-differential subsidy paid by the Secretary as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

(Emphasis added.)

Plaintiffs have argued at substantial length that both the express language of section 506 and the legislative history of both its original 1936 version and its amended 1938 version, as well as the express language of section 501, demonstrate that Congress intended for CDS contracts to be irrevocable and that the *only* means by which ships built with CDS could ever engage in domestic trade is a six-month temporary waiver as expressly provided by section 506. The Court's own review of the pertinent statutory language and legislative history, however, leads the Court to conclude otherwise. While both the statutory language and the legislative history amply support the conclusion that the Secretary's authority with respect to *temporary* waivers of domestic trading restrictions is limited to six-month periods, *nothing* in section 506, in any other provision of Title V, or in the legislative history of these provisions either expressly or implicitly addresses the issue of *permanent* revocation of a CDS contract.

In view of this total dearth of guidance from the statutory language and the legislative history, it is necessary for the Court to consider other indicia of legislative intent to determine whether section 506 was intended to preclude the Secretary from permanently waiving domestic trading restrictions in exchange for CDS repayment. As the Court of Appeals for this Circuit recently indicated in a case involving the award of operating-differential subsidies (ODS) under another title of the Merchant Marine Act of 1936, "when there is little

guidance to be derived from the language of the statute itself," the reviewing court should consider whether the agency's interpretation of the Act "serves to further the purposes of the legislation in a reasonable and sound manner." *Sea-Land Service, Inc.* v. *Kreps*, 566 F.2d 763, 778 (D.C.Cir. 1977). In the present case, the Court concludes that, as in the *Sea-Land* case, the Secretary's interpretation of the Act furthers the Act's purposes.

The goals of the Merchant Marine Act of 1936 were described by the *Sea-Land* court as follows:

> The Merchant Marine Act of 1936 was enacted to foster the development and continued maintenance of a modern merchant marine fleet for the United States. The Act's declaration of policy states [in 46 U.S.C. § 1101] that
>
> > It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency * * *.
>
> To accomplish these goals the Act establishes two subsidies for American shipping enterprises—the operating-differential subsidy . . . and a construction-differential subsidy (CDS) . . . .

566 F.2d 765. There can be no doubt that these statutory purposes are extraordinarily broad, and it would be patently inconsistent with the far-reaching nature of this statutory scheme to interpret the Secretary's authority

in an unnecessarily restrictive manner. Plaintiffs' position that the domestic trading restrictions of CDS contracts are *totally irrevocable* precludes any and all administrative flexibility and thereby at least potentially obstructs the Secretary's ability to effectuate the broad statutory goals set forth above. In view of the fact that neither section 506 nor its legislative history indicates that the Secretary's authority should be limited in this manner, the Court concludes that plaintiffs' construction is unreasonably constrictive.

As the Supreme Court said in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 776, 88 S.Ct. 1344, 1364, 20 L.Ed.2d 312 (1968):

> This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred . . . . Surely the [agency's] broad responsibilities . . . demand a generous construction of its statutory authority.

And, as the Court of Appeals for this Circuit recently held in *Natural Resources Defense Council, Inc.* v. *Costle*, 568 F.2d 1369, 1381-1382 (1977): "[W]here intent on an issue is unclear, we are instructed to afford the administering agency the flexibility necessary to achieve the general objectives of the Act." For these reasons, the Court concludes that the Secretary's interpretation that she has legal authority under the Act to waive permanently domestic trading restrictions in an appropriate case in exchange for CDS repayment is reasonable and should be upheld.[2]

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[2] This is not to say that the Secretary's authority to waive permanently domestic trading restrictions in exchange for CDS repayment is unbridled. Rather, it is to say that the appropriateness of the Secretary's invocation of such authority is best judged on a case-by-case basis. *See* section VI, *infra*.

This conclusion is buttressed by the Comptroller General's 1964 decision with respect to two CDS ships owned by Grace Line, Inc., Decision B-155039, 44 Comp. Gen. 180 (1964), and by the consistent reaffirmation of the validity of this decision by both the Secretary and, on at least one occasion, by Congress. The 1964 *Grace Line* opinion concerned the S.S. SANTA ELIANA and the S.S. SANTA LEONOR, both of which were built under CDS contracts and were therefore subject to the section 506 domestic trading restrictions. Grace Line requested the Secretary to amend the CDS contracts on these ships to remove the domestic trading restrictions in exchange for repayment of CDS so that the vessels could be used in domestic trade. The Secretary concluded that MarAd/MSB had the legal authority to so amend CDS contracts and sought the views of the Comptroller General on this subject. The *Grace Line* opinion manifests the Comptroller General's concurrence in the Secretary's interpretation of MarAd/MSB's authority.

Since the 1964 *Grace Line* transaction, the Secretary has consistently interpreted section 506 as *not* precluding permanent waiver of domestic trading restrictions in exchange for CDS repayment in the few instances when the issue has arisen. Thus, in 1970, when Seatrain Lines, Inc., the parent of the defendant-intervenors herein, proposed that MarAd/MSB agree, as part of a CDS contract for two vessels other than the STUYVESANT, to permit "*permanent* operation of the vessels in domestic trade upon the repayment of the unamortized portion of CDS," MarAd/MSB's General Counsel reaffirmed the Department's position that the Secretary has the "discretionary authority" in an appropriate case to lift section 506 trading restrictions in exchange for CDS repayment.[3]

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[3] Plaintiffs make much of the fact that this legal opinion recommended against approving the repayment proposal. The proposal, however, sought a *pre-contract commitment* from the Secretary to permit CDS buyback "at any time" after contract expiration. The

MarAd/MSB again reaffirmed this position in 1976. At that time, the Atlas Marine Company and the Aquarius Marine Company requested MarAd/MSB to agree to an amendment of their CDS contracts for the S.S. AMERICAN HERITAGE and the S.S. GOLDEN MONARCH respectively These vessels were at that time engaged in trade between the mainland United States and the Virgin Islands, which are not considered a domestic port for the purposes of domestic trading restrictions. *See American Maritime Association* v. *Blumenthal, supra.* MarAd/MSB approved the requested amendments which permit the vessel owners to repay CDS in exchange for the removal of domestic trading restrictions *if* the non-domestic status of the Virgin Islands is changed at some later date. While plaintiffs attempt to downplay the significance of these recent CDS contract amendments because of their conditional nature, there can be no doubt that MarAd/MSB's actions with respect to these contracts were based on a reaffirmation of the Secretary's legal authority to waive trading restrictions in exchange for CDS repayment.

In addition to these administrative reaffirmations of the Secretary's authority, Congress has implicitly affirmed the Secretary's exercise of authority in the *Grace Line* case. In 1972, Congress amended section 1104(a)

General Counsel considered such a proposal contrary to the purposes of the Act because it would "bind future Boards to exercise a discretionary authority without any regard" to the particular circumstances of a specific application. Thus, the legal opinion concludes:

> The consequence of [the] proposal, if accepted, would be to convert a *matter of future exercise of discretionary authority* by the Board into a present right of [the CDS recipient], at its option, to lift the restrictions by CDS repayment.
>
> Such a result is not in keeping with the basic policies of the Act and conflict with the scope of discretionary authority intended to be vested in the Board.

(Emphasis added.)

(3) of Title XI of the Act, 46 U.S.C. § 1274(a)(3), to expand the Secretary's financing authority under Title XI to include loan guarantees for the purpose of financing repayments "in whole or in part" of CDS. This section, when initially introduced, spoke of

> financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to Title V of this Act, as amended, in order to release such vessel from all restrictions imposed as a result of the payment of construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions.

H.R. 9756, 92d Cong., 1st Sess. § 3 (1971). Of course, the financing authority conferred by Title XI is necessarily predicated on the authority of the Secretary to approve the underlying transaction, for otherwise Title XI financing authority would be a useless device. Thus, if Congress had enacted the entirety of the above-quoted language, the second half of which speaks of releasing CDS vessels from *all* restrictions resulting from the payment of CDS, Congress' affirmation of the Secretary's interpretation would have been explicit.

Congress did not enact this initially-proposed language in its entirety; instead it enacted only the first half of the section as introduced, thereby omitting the explanatory language in the second half. The House report indicates clearly, however, that the reason the Committee on Merchant Marine and Fisheries omitted the explanatory language was *not* to limit the Secretary's Title XI financing authority to one type of CDS repayment arrangement or another, but rather to extend such authority "to all instances of subsidy repayments under Title V." In

explaining this action, the Report makes express reference to the *Grace Line* case:

> In the entire history of the administration of the 1936 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special circumstances, could have called into play the provisions of this paragraph. Your Committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act. Your Committee therefore has amended the legislation by deleting the [explanatory] language.

H.R.Rep.No. 92-688, 92d Cong., 1st Sess. 10 (1971). There can be no doubt that this explanation evidences the Committee's belief that the 1936 Act authorized the Secretary, *inter alia*, to remove domestic trading restrictions in exchange for CDS repayment, and Congress' enactment of the House Committee's version of section 1104(a)(3) must be deemed as approving the Committee's understanding of the Secretary's authority.

In view of the Secretary's consistent and relatively long-standing interpretation of her authority, the Court finds that the present case is an appropriate one in which to defer to the "experience and informed judgment" of the Secretary. *See Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944).[4] Such deference

[4] Nothing in this Court's recent opinion in *Investment Annuity, Inc.* v. *Blumenthal*, 442 F.Supp. 681 (D.D.C. 1977), is inconsistent with the conclusion herein that the Secretary's interpretation of her authority in the circumstances of this case is entitled to substantial deference. In *Investment Annuity*, wherein the Court refused to accord substantial deference to the Internal Revenue Service, the

is particularly warranted in this case because of Congress' implicit affirmation of the Secretary's interpretation in its enactment of the 1972 amendments to Title XI of the Act. In view of the fact that the Secretary's interpretation is reasonable and seems to further the purposes of the Act, and since deference to this interpretation is warranted in the instant case, the Court holds that section 506 does *not* bar the Secretary from waiving domestic trading restrictions permanently in exchange for repayment of CDS.

In conclusion, therefore, the Secretary has authority to accept repayment of CDS in appropriate circumstances. Since section 506 does *not* preclude the permanent waiver of domestic trading restrictions in exchange for such repayment, the Secretary has authority to waive permanently the section 506 domestic trading restrictions upon the STUYVESANT in exchange for CDS repayment.

IV. THE ACT DOES NOT PRECLUDE THE SECRETARY FROM ACCEPTING A 20-YEAR PROMISSORY NOTE AS REPAYMENT FOR A CONSTRUCTION—DIFFERENTIAL SUBSIDY

Plaintiff's second basis for challenging the Secretary's actions with respect to the CDS repayment for the STUYVESANT is that the form of repayment approved by the Secretary—a 20-year promissory note—is not equivalent to *full* repayment and that only full repayment will suffice to permit the Secretary to waive permanently domestic trading restrictions. Of course, as the preceding

Service's interpretation was entirely unprecedented and was in fact inconsistent both with 12 years of consistent treatment by the Service and with a private ruling issued by the Service during the pendency of the litigation. Moreover, the Service's new interpretation was unreasonable and was the product of improper tax reform considerations. Thus, the difference between the two cases could hardly be more pronounced.

discussion reveals, the Secretary's authority to accept CDS repayment in appropriate cases is not explicit in the Act. As a result, there is naturally neither statutory language nor legislative history to elucidate the scope of the Secretary's authority to structure the form of such repayment transactions.

In view of the Secretary's broad contractual authority which all parties agree extends to appropriate CDS repayment transactions, and the Court's previous conclusion that it would be patently inconsistent with the far-reaching nature of the Act's statutory scheme to interpret the Secretary's authority in an unnecessarily restrictive manner, the Court finds that it would be entirely inappropriate at this stage of the litigation for the Court to accept plaintiffs' contention that no form of promissory note can legally be accepted by the Secretary as repayment for CDS. The Court concurs in defendant-intervenors' assessment that the determination of the legality of a given method of payment is most appropriately left to the discretion of the Secretary with judicial interference restricted to review of individual determinations to ensure that the requirements of the Administrative Procedure Act (APA) are satisfied. Accordingly, the Court concludes that CDS repayment by means of a promissory note is not precluded by the Act.

V. PLAINTIFFS' HAVE BEEN DEPRIVED OF NO PROPERTY INTEREST COGNIZABLE UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, AND THEY ARE THEREFORE ENTITLED TO NO RELIEF UPON THEIR CONSTITUTIONAL CLAIM

The third ground upon which plaintiffs challenge the defendants' actions with respect to the STUYVESANT is the Due Process Clause of the fifth amendment. Plaintiffs assert that this clause requires the Secretary to afford

plaintiffs and other interested parties an adequate opportunity to present their views before approving the waiver of domestic trading restrictions. They contend that the Secretary therefore denied them due process of law by not giving them adequate notice of Polk's August 25, 1977 application for total CDS repayment and permanent waiver of domestic trading restrictions.

Notwithstanding the alleged "lack of process" in the Secretary's decision-making with respect to the STUYVESANT, it is clear that plaintiffs' rights under the Due Process Clause were not abridged. The Due Process Clause is not a panacea for all instances where an agency of the federal government fails to act pursuant to appropriate procedures. Rather, as the Court of Appeals for this Circuit recently held:

> Only if the Court first finds that a "liberty" or "property" interest is affected will it go on to a balancing of interests analysis to determine what level of procedural protection is appropriate. *E.g. Fusari* v. *Steinberg*, 419 U.S. 379, 389, 95 S.Ct. 533, 42 L.Ed. 2d 521 (1975); *Board of Regents* v. *Roth*, [408 U.S. 564, 570-71 & n.8, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)]; *Morrissey* v. *Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Mazaleski v. *Treusdell*, 562 F.2d 701, 709 (D.C.Cir. 1977). *Accord, Colm* v. *Vance*, 567 F.2d 1125 (D.C.Cir. Nov. 18, 1977).

In the instant case, plaintiffs have no "property interest" in the STUYVESANT transaction within the meaning of the Due Process Clause. Plaintiffs have alleged that the Secretary's actions deprived them of a "business opportunity," denied them their statutory right to be free from the unfair competition of CDS-vessels, and indirectly caused their vessels to decrease in value because the result of the Secretary's actions is to increase

the supply of ships qualified to engage in domestic trade. Plaintiffs have cited absolutely no applicable precedents for characterizing these injuries as deprivations of "property interests." Plaintiffs have no "legitimate claim of entitlement" to be free from competition. *Cf. Board of Regents* v. *Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Accordingly, the Court concludes that plaintiffs have not been deprived of any property interests cognizable under the Due Process Clause. If they are entitled to any relief as a result of the alleged "lack of process" in the Secretary's decision-making with respect to the STUYVESANT, such relief must be derived from the Administrative Procedure Act (APA) or some other federal statute.

VI. THE SECRETARY FAILED TO GIVE FULL AND PROPER CONSIDERATION TO THE COMPETITIVE EFFECTS OF HER DECISIONS TO ACCEPT CDS REPAYMENT BY WAY OF A 20-YEAR PROMISSORY NOTE AND TO WAIVE PERMANENTLY DOMESTIC TRADING RESTRICTIONS UPON THE STUYVESANT, AND HER DECISION WAS, THEREFORE, ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION

Having determined that the Secretary has general authority to accept CDS repayment and to waive permanently domestic trading restrictions in exchange for such repayment, that the Act does not proscribe the acceptance of a promissory note as repayment for CDS, and that plaintiffs have no property interest in the STUYVESANT transaction cognizable under the Due Process Clause, it becomes necessary to consider plaintiffs' final contention that the Secretary's actions with respect to the STUYVESANT are violative of the APA. Plaintiffs assert three claims in support of this contention. First, they ar-

gue that the defendants acted in violation of 5 U.S.C. § 552(a)(1), as interpreted by the Supreme Court in *Morton* v. *Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), by failing to promulgate "substantive rules of general applicability," 5 U.S.C. § 552(a)(1)(D), prior to acting in the instant case. Second, they claim that the Secretary's actions were arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A) in that the "operative decision" to waive domestic trading restrictions on the STUYVESANT was made without notice sometime in 1975 and kept secret until August 1977. Finally, they claim that the Secretary's decisions to waive domestic trading restrictions and to accept a 20-year promissory note as CDS repayment were arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A) because these decisions were made without full and proper consideration of relevant factors. For the reasons hereinafter stated, the Court concludes that plaintiffs are entitled to partial summary judgment on their third APA claim, that defendants and defendant-intervenors are entitled to summary judgment on plaintiffs' first APA claim and, finally, that material facts in dispute preclude resolution of plaintiffs' second APA claim.

Plaintiffs' first APA claim—that defendants violated 5 U.S.C. § 552(a)(1)—is based on the 1974 decision by the Supreme Court in *Morton* v. *Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270. In that case, the Court employed some extraordinary far-reaching language in holding that the Bureau of Indian Affairs of the Department of the Interior had failed to comply with the APA in developing eligibility requirements for welfare benefits. Thus, the Court said:

> The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or ex-

> plicitly, by Congress. . . . No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis by the dispenser of funds.
>
> The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.

415 U.S. at 232-33, 94 S.Ct. at 1072-73.

Notwithstanding this sweeping language, it appears to the Court that section 552(a)(1) does not compel the Secretary to promulgate regulations to govern *all* aspects of her general contractual authority. Although *Ruiz* might suggest otherwise, it appears that neither the Supreme Court nor the lower courts have interpreted *Ruiz* in such an expansive manner. *See* K. Davis, *Administrative Law of the Seventies* § 6.13-1(1976) ("Altogether, the *Ruiz* opinion does not seem to be a reliable guide as to present or future law." (at 240)). A careful reading of section 552(a)(1) and particularly subsection (D) indicates that, rather than requiring the promulgation of substantive regulations as plaintiffs contend, this section requires the *publication* of such rules and interpretations "of general applicability" that are in fact "formulated and adopted by the agency." Accordingly, the Court concludes that the APA does not *require* the Secretary to promulgate regulations prior to exercising her general contractual authority to accept CDS repayment and to waive permanently domestic trading restrictions.

Nevertheless, as the Court indicated at the most recent hearing in this case, the Court firmly believes that whether or not the strict mandate of Congress requires the promul-

gation of regulations, the Secretary should, as a matter of sound policy, establish guidelines and procedures of general applicability to govern CDS repayment and permanent waivers of domestic trading restrictions. The Court is unpersuaded that there is any compelling reason for the Secretary to make determinations on applications such as that concerning the STUYVESANT on an *ad hoc* basis. Substantive guidelines and procedural requirements for applications should be established so that all members of the industry stand on equal footing before the Secretary, and these procedures should guarantee interested competitors and members of the public the opportunity to be heard. *Cf. Joseph* v. *United States Civil Service Commission*, 180 U.S.App.D.C. 281, 293, 554 F.2d 1142, 1154 n.26 (1977). As the Court of Appeals for this Circuit stated in a related maritime-subsidy context:

> [S]ince Congress has delegated the authority to the Secretary to pass upon applications for contracts of government subsidy, and since these grants are part of the govervent wealth, it is incumbent upon the Secretary to follow sound administrative procedures to determine the necessity of expenditures and thereby serve the master, public interest.

Sea-Land Service, Inc. v. *Connor*, 135 U.S.App.D.C. 306, 313, 418 F.2d 1142, 1149 (1969). The Court is confident that the Secretary will give these concerns regarding the need for appropriate regulations her most serious consideration.

Plaintiffs' second APA claim is that the Secretary's actions were arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A) in that the "operative decision" to accept CDS repayment and to waive permanently domestic trading restrictions on the STUYVESANT was made without notice in 1975 and

kept secret until August 1977. It appears to the Court, however, that material facts remain in dispute with respect to plaintiffs' allegations concerning the pre-1977 actions of the Secretary. It further appears to the Court that additional discovery should be permitted prior to resolution of this APA argument. Accordingly, the Court will at this time deny those portions of defendants' and defendant-intervenors' motions that seek summary judgment on this second APA claim.[5]

Plaintiffs' final APA claim is that the Secretary's actions were arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A) in that she failed to give full and proper consideration to relevant factors prior to rendering her decisions with respect to the STUYVESANT. It is a well-established tenet of administrative law that an essential function of judicial review is to ensure that the agency decision was based on a consideration of the "relevant factors." *See, e.g., Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 417, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); *American Paper Institute* v. *Train*, 177 U.S.App.D.C. 181, 191, 543 F.2d 328, 338 (1976); *Ethyl Corp.* v. *EPA* 176 U.S App.D.C. 373, 408, 541 F.2d 1, 34, *cert. denied*, 426 U.S. 941, 96 S.Ct. 2663, 49L.Ed.2d 394 (1976). Failure of an agency to consider such relevant factors, or failure to accord such factors appropriate weight, renders the agency's decision arbitrary and capricious. *Id.* In making this determination, the focal point of the Court's scrutiny must be the "full administrative record that was before the Secretary at the time [she] made [her] decision." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 410 U.S. at 421, 91 S.Ct. at 825. *See Doraiswamy* v. *Secretary of Labor*, 180 U.S.App.D.C. 360, 369-370, 555 F.2d 832, 841-42 (1976).

[5] Plaintiffs have not moved for summary judgment on this claim because of their alleged need for further discovery.

Defendants in the present case submitted to the Court on October 28, 1977, two certified administrative records. The first of these deals with the Secretary's decision to accept repayment of CDS and to waive permanently domestic trading restrictions in exchange therefor. The second concerns the Secretary's decision to approve the sale of the STUYVESANT and the related financial transactions that were closed on September 30, 1977. The Court has carefully scrutinized both records. This scrutiny reveals that the Secretary gave serious consideration to the following factors: (1) the lack of viable employment opportunities for the STUYVESANT other than in the Alaska oil trade; (2) the improvement of the Government's collateral position and the prevention of possible defaults on other outstanding obligations; and (3) the continued viability of Seatrain Shipbuilding. This scrutiny also reveals, however, that the Secretary failed to consider the effect of her decisions with respect to the STUYVESANT upon competition in the domestic transportation of Alaskan oil. It thus becomes necessary to determine whether "competitive effect" is a "relevant factor" such that the Secretary's failure to consider such effect renders her decision arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A).

Of course, since the Act contains no express authority for permanent waivers of domestic trading restrictions, there are no specific statutory factors which the Secretary must consider in determining whether to accept CDS repayment in exchange for such waivers. Similarly, the Act provides no express guidance as to what factors should be considered by the Secretary in structuring the form of such repayment. Moreover, the Secretary has promulgated no guidelines of her own to govern decisions of these types. This is not to say, however, that the Secretary's authority in these matters is unrestricted. The absence of express legislative authority to waive permanently domestic trading restrictions should not effectively insulate

the Secretary from judicial review. Rather, in the absence of express statutory and regulatory guidelines, the Court must look to the purposes of the Act to ascertain what factors the Secretary should consider in her decision-making. *Cf. Sea-Land Service, Inc.* v. *Kreps*, *supra.*

Analysis of the Act and its legislative history indicates clearly that the protection of unsubsidized vessels from the "unfair" competition of subsidized vessels is one of the cornerstones of the statutory scheme. The most compelling evidence of the importance of this statutory purpose is section 506 itself, which, as previously demonstrated, *requires* CDS recipients to agree to domestic trading restrictions. As both the 1936 and 1938 legislative histories reveal, an overriding concern of Congress in replacing the pre-existing mail subsidy program with the CDS and ODS programs of the 1936 Act was to insulate unsubsidized domestic vessels from the debilitating effect of subsidized competition. Thus the *pro rata* payback for the six-month waivers expressly authorized by section 506 was specifically intended to ensure that subsidized vessels would at no time possess an unfair cost advantage over unsubsidized vessels. The importance of the competitive effect of trading restriction waivers is further underscored by MarAd's recently promulgated regulations governing temporary section 506 waivers for the carriage of Alaskan oil between Alaska and the Panama Canal. These regulations, 46 C.F.R. §§ 250.1-250.6, 42 Fed. Reg. 33,035-36 (June 29, 1977), specifically require the Assistant Secretary of Commerce for Maritime Affairs to publish notice of all temporary waiver applications for the carriage of Alaskan oil and further require him to give consideration to written protests filed by competitiors. 46 C.F.R. § 250.4. There can be no doubt that this second requirement evidences that the Secretary herself recognizes the importance of considering

the competitive effect of waivers of section 506 domestic trading restrictions.[6]

These indications of statutory purpose lead the Court to conclude that competitive effect is not only a "relevant factor," but is in fact an essential factor to be considered before decisions with respect to trading restriction waivers are made. Thus, before approving the permanent waiver of domestic trading restrictions upon the STUYVESANT, the Secretary should have given full consideration to (1) the effect upon competition of permitting the STUYVESANT to engage in the Alaskan oil trade, and (2) the effect upon competition of permitting Polk to repay the STUYVESANT's CDS with a 20-year promissory note rather than requiring immediate payment in full and/or requiring payment of an interest assessment for the period since the CDS had been paid to Seatrain Shipbuilding. The Secretary's failure to give full consideration to these effects must be deemed to render her decisions with respect to the STUYVESANT arbitrary, capricious, and an abuse of discretion and, therefore, violative of 5 U.S.C. § 706(2)(A).

Accordingly, the Court will grant plaintiffs' summary judgment in part insofar as their motions seek relief for the Secretary's failure to give appropriate consideration to relevant factors in her decision-making with respect to the STUYVESANT. The Court will therefore remand the case to the Secretary in order to permit her to consider the protests of plaintiffs and other interested parties and to give appropriate weight to competitive effect in her ultimate decision with respect to the STUY-

[6] Further evidence of the Secretary's recognition of the importance of competitive effect is that she excluded from the waiver regulations those segments of the Alaskan oil trade—Alaska-West Coast and Panama Canal-Atlantic/Gulf Coast—for which "suitable tank vessels built without CDS appear to be available." 42 Fed.Reg. at 33,035.

VESANT. Because of the necessity of the expeditious final resolution of this controversy, the Court will order defendants to complete such further consideration within 45 days from the date of this Memorandum Opinion and accompanying Order.

VII. CONCLUSION

The Court concludes that the Secretary of Commerce has authority under the Merchant Marine Act of 1936 to waive permanently domestic trading restrictions on a vessel built with construction-differential subsidy in exchange for repayment of such subsidy and that the Secretary further has authority to accept a 20-year promissory note as such repayment. The Court also concludes that plaintiffs have no property interest in the STUYVESANT transactions which is cognizable under the Due Process Clause of the fifth amendment. In addition, the Court concludes that defendants are not required by 5 U.S.C. § 552(a)(1) to promulgate "substantive rules of general applicability" to govern CDS payback and permanent trading restriction waivers. Accordingly, the Court will grant defendants' and defendant-intervenors' motions for summary judgment with respect to those portions of the complaints herein that seek relief based on the aforestated arguments.

The Court concludes, however, that plaintiffs are entitled to partial summary judgment with respect to their claim that the Secretary's decisions concerning the STUYVESANT were arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A) because she failed to consider the competitive effects of her decisions. Accordingly, the Court will remand this case to the Secretary for her immediate consideration.

Finally, the Court concludes that plaintiffs' remaining claim that the Secretary's decisions with respect to the

STUYVESANT were arbitrary, capricious, and an abuse of discretion because they were made without notice in 1975 and kept secret until August 1977 cannot be resolved on the pending motions because material facts relating to this claim remain in dispute. Accordingly, the Court will deny defendants' and defendant-intervenors' motions for summary judgment insofar as they relate to this claim, and this claim will remain before the Court to permit further discovery.

An Order in accordance with the foregoing will be issued of even date herewith.

APPENDIX B

STATUTORY PROVISIONS INVOLVED

THE MERCHANT MARINE ACT, 1936, AS AMENDED, 46 U.S.C. §§ 1101 *et seq.*, AS AMENDED

MERCHANT MARINE ACT, 1936

(Revised through the 94th Congress)

[49 Stat. 1985, approved June 29, 1936]

AN ACT

To further the development and maintenance of an adequate and well-balanced American merchant marine, to promote the commerce of the United States, to aid in the national defense, to repeal certain former legislation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—DECLARATION OF POLICY

SECTION 101. It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

SEC. 207. The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. All the Commission's financial transactions shall be audited in the General Accounting Office according to approved commercial practice as provided in the Act of March 20, 1922 (42 Stat. 444): *Provided.* That it shall be recognized that, because of the business activities authorized by this Act, the accounting officers shall allow credit for all expenditures shown to be necessary because of the nature of such authorized activities, notwithstanding any existing statutory provision to the contrary. The Comptroller General shall report annually or oftener to Congress any departure by the Commission from the provisions of this Act.

SEC. 210. It shall be the duty of the Secretary of Commerce to make a survey of the American merchant marine, as it now exists, to determine what additions and replacements are required to carry forward the national policy declared in section 101 of this Act, and the Secretary of Commerce is directed to study, perfect, and adopt a long-range program for replacements and additions to the American merchant marine so that as soon as practicable the following objectives may be accomplished:

First, the creation of an adequate and well-balanced merchant fleet, including vessels of all types, to provide shipping service essential for maintaing the flow of the foreign commerce of the United States, the vessels in such fleet to be so designed as to be readily and quickly convertible into transport and supply vessels in a time of national emergency. In planning the development of

such a fleet the Secretary of Commerce is directed to cooperate closely with the Navy Department as to national-defense needs and the possible speedy adaptation of the merchant fleet to national-defense requirements.

Second, the ownership and the operation of such a merchant fleet by citizens of the United States insofar as may be practicable.

Third, the planning of vessels designed to afford the best and most complete protection for passengers and crew against fire and all marine perils.

Fourth, the creation and maintenance of efficient shipyards and repair capacity in the United States with adequate numbers of skilled personnel to provide an adequate mobilization base.

SEC. 211. The Secretary of Commerce is authorized and directed to investigate, determine, and keep current records of—

(a) The ocean services, routes, and lines from ports in the United States, or in a Territory, district, or possession thereof, to foreign markets, which are, or may be, determined by the Secretary of Commerce to be essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States, and in reaching his determination the Secretary of Commerce shall consider and give due weight to the cost of maintaining each of such steamship lines, the probability that any such line cannot be maintained except at a heavy loss disproportionate to the benefit accruing to foreign trade, the number of sailings and types of vessels that should be employed in such lines, and any other facts and conditions that a prudent businessman would consider when dealing with his own business, with the added consideration, however, of the intangible benefit the maintenance of any such lines may afford to the foreign commerce of the United States, to the national defense, and to other national requirements;

(b) The bulk cargo carrying services that should, for the promotion, development, expansion, and maintenance of the foreign commerce of the United States and for the national defense or other national requirements be provided by United States-flag vessels whether or not operating on particular services, routes, or lines;

(c) The type, size, speed, method of propulsion, and other requirements of the vessels, including express-liner or super-liner vessels, which should be employed in such services or on such routes or lines, and the frequency and regularity of the sailings of such vessels, with a view to furnishing adequate, regular, certain, and permanent service, or which should be employed to provide the bulk cargo carrying services necessary to the promotion, maintenance, and expansion of the foreign commerce of the United States and its national defense or other national requirements whether or not such vessels operate on a particular service, route, or line;

(d) The relative cost of construction of comparable vessels in the United States and in foreign countries;

(e) The relative cost of marine insurance, maintenance, repairs, wages and subsistence of officers and crews, and all other items of expense, in the operation of comparable vessels under the laws, rules, and regulations of the United States and under those of the foreign countries whose vessels are substantial competitors of any such American vessel;

(f) The extent and character of the governmental aid and subsidies granted by foreign governments to their merchant marine;

(g) The number, location, and efficiency of the shipyards existing on the date of the enactment of this Act or thereafter built in the United States;

(h) To investigate and determine what provisions of this Act and other Acts relating to shipping should be made applicable to aircraft engaged in foreign commerce in order to further the policy expressed in this Act, and to recommend appropriate legislation to this end;

(i) The advisability of enactment of suitable legislation authorizing the Secretary of Commerce, in an economic or commercial emergency, to aid the farmers and cotton, coal, lumber, and cement producers in any section of the United States in the transportation and landing of their products in any foreign port, which products can be carried in dry-cargo vessels by reducing rates, by supplying additional tonnage to any American operator, or by operation of vessels directly by the Secretary of Commerce, until such time as the Secretary of Commerce shall deem such special rate reduction and operation unnecessary for the benefit of the American farmers and such producers; and

(j) New designs, new methods of construction, and new types of equipment for vessels; the possibilities of promoting the carrying of American foreign trade in American vessels; and intercoastal and inland water transportation, including their relation to transportation by land and air.

SEC. 212. The Commission is authorized and directed—

(a) To study all maritime problems arising in the carrying out of the policy set forth in title I of this Act;

(b) To study, and to cooperate with vessel owners in devising means by which—

(1) the importers and exporters of the United States can be induced to give preference to vessels under United States registry; and

(2) there may be constructed by or with the aid of the United States express-liner or super-liner vessels com-

parable with those of other nations, especially with a view to their use in national emergency, and the use in connection with or in lieu of such vessels of transoceanic aircraft service;

(c) To collaborate with vessel owners and shipbuilders in developing plans for the economical construction of vessels and their propelling machinery, of most modern economical types, giving thorough consideration to all well-recognized means of propulsion and taking into account the benefits accruing from standardized production where practicable and desirable;

(d) To establish and maintain liaison with such other boards, commissions, independent establishments, and departments of the United States Government, and with such representative trade organizations throughout the United States as may be concerned, directly or indirectly, with any movement of commodities in the water-borne export and import foreign commerce of the United States, for the purpose of securing preference to vessels of United States registry in the shipment of such commodities;

(e) To investigate, under the regulatory powers transferred to it by this Act, any and all discriminatory rates, charges, classifications, and practices whereby exporters and shippers of cargo originating in the United States are required by any common carrier by water in the foreign trade of the United States to pay a higher rate from any United States port to a foreign port than the rate charged by such carrier on similar cargo from such foreign port to such United States port, and recommend to Congress measures by which such discrimination may be corrected; and

(f) To study means and methods of encouraging the development and implementation of new concepts for the carriage of cargo in the domestic and foreign commerce

of the United States, and to study the economic and technological aspects of the use of cargo containers as a method of carrying out the declaration of policy set forth in title I of this Act, and in carrying out the provisions of this clause and such policy the United States shall not give preference as between carriers upon the basis of length, height, or width of cargo containers or length, height, or width of cargo container cells and this requirement shall be applicable to all existing container vessels and any container vessel to be constructed or rebuilt.

(g) To make recommendations to Congress, from time to time, for such further legislation as it deems necessary better to effectuate the purpose and policy of this Act.

Reorganization Plan No. 21 of 1950 (64 Stat. 1273)

Effective May 24, 1950

[As amended by Public Law 91-469 (84 Stat. 1036)]

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, aproved June 20, 1949

PART I. FEDERAL MARITIME BOARD

SECTION 101. *Creation of Federal Maritime Board.*—There is hereby established a Federal Maritime Board, hereinafter referred to as the Board.

SEC. 102. *Composition of the Board.*—(a) The Board shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate.

(b) The President shall from time to time designate one of such members to be the Chairman of the Board, hereinafter referred to as the Chairman.

(c) One of such members first appointed shall be appointed for a term expiring on June 30, 1952, another for a term expiring on June 30, 1953, and the third for a term expiring on June 30, 1954. Their successors shall be appointed for terms of four years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he succeeds. Not more than two of the members of the Board shall be appointed from the same political party. A vacancy in the office of any such members shall be filled in the same manner as the original appointment. The Chairman shall receive a salary at the rate of $16,000 per annum, and each of the other two members shall receive a salary at the rate of $15,000 per annum.

(d) A vacancy in the Board, so long as there shall be two members in office, shall not impair the power of the Board to execute its functions. Any two of the members in office shall constitute a quorum for the transaction of the business of the Board, and the affirmative votes of any two members of the Board shall be sufficient for the disposition of any matter which may come before the Board.

SEC. 103. *Transfer of functions to the Chairman.*—All functions of the Chairman of the United States Maritime Commission (including his functions under the provisions of Reorganization Plan Numbered 6 of the 1949) with respect to the functions transferred to the Board by the provisions of sections 104 and 105 of this reorganization plan are hereby transferred to the Chairman of the Federal Maritime Board.

SEC. 104. *Transfer of regulatory functions to the Board.*—The following functions of the United States Maritime Commission are hereby transferred to the Board.

(1) All functions under the provisions of sections 14 to 20, inclusive, and sections 22 to 33, inclusive, of the Shipping Act, 1916, as amended (46 U.S.C. 812-819 and 821-832), including such functions with respect to the regulation and control of rates, services, practices, and agreements of common carriers by water and of other persons.

(2) All functions with respect to the regulation and control of rates, fares, charges, classifications, tariffs, regulations, and practices of common carriers by water under the provisions of the Intercoastal Shipping Act, 1933, as amended (46 U.S.C. 843-848).

(3) The functions with respect to the making of rules and regulations affecting shipping in the foreign trade to adjust or meet conditions unfavorable to such shipping, and with respect to the approval, suspension, modification, or annulment of rules or regulations of other Federal agencies affecting shipping in the foreign trade, under the provisions of section 19 of the Merchant Marine Act, 1920, as amended (46 U.S.C. 876), exclusive of subsection (1)(a) thereof.

(4) The functions with respect to investigating discriminatory rates, charges, classifications, and practices in the foreign trade, and with respect to recommending legislation to correct such discrimination, under the provisions of section 212(e) of the Merchant Marine Act, 1936 (46 U.S.C. 1122(e)).

(5) So much of the functions with respect to requiring the filing of reports, accounts, records, rates, charges, and memoranda, under the provisions of section 21 of the Shipping Act, 1916, as amended (46 U.S.C. 820), as relates to the functions of the Board under the provisions of sections 104(1) to 104(4), inclusive, of this reorganization plan.

SEC. 105. *Transfer of subsidy award and other functions to the Board.*—The following functions of the United States Maritime Commission are hereby transferred to the Board:

(1) The functions with respect to making, amending, and terminating subsidy contracts, and with respect to conducting hearings and making determinations antecedent to making, amending, and terminating subsidy contracts, under the provisions of Titles V, VI, and VIII, and sections 301, 708, 805(a), and 805(f) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1131, 1151-1182, 1198, 1211-1213, 1223(a), and 1223(f)), together with the functions with respect to making changes, subsequent to entering into an operating differential subsidy contract, in such determinations under the provisions of section 301 of such Act, as amended (46 U.S.C. 1131), and readjustments in determinations as to operating cost differentials under the provisions of section 606 of such Act, as amended (46 U.S.C. 1176), and with respect to the approval of the sale, assignment, or transfer of any operating subsidy contract under section 608 of such Act (46 U.S.C. 1178): *Provided*, That, for the purposes of this section 105(1) of this reorganization plan, the term "subsidy contract" shall be deemed to include, in the case of a construction differential subsidy, the contract for the construction, reconstruction, or reconditioning of the vessel and the contract for the sale of the vessel to the subsidy applicant or the contract to pay a construction differential subsidy and the cost of national defense features, and, in the case of an operating differential subsidy, the contract with the subsidy applicant for the payment of the subsidy: *Provided further*, That, except as otherwise hereinbefore provided in respect of functions under sections 301, 606, and 608 of the Merchant Marine Act, 1936, as amended, the functions transferred by the provisions of this section 105(1) shall exclude the making of all determinations and the taking of all actions (other than amending or terminating any

subsidy contract), subsequent to entering into any subsidy contract, which are involved in administering such contract: *Provided further*, That actions of the Board in respect to the functions transferred by the provisions of this section 105(1) shall be final.

Reorganization Plan No. 7 of 1961 (75 Stat. 840)

Effective August 12, 1961

[As amended by Public Law 91-469 (84 Stat. 1036)]

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, June 12, 1961, pursuant to the provisions of the Reorganization Act of 1949, 63 Stat. 203, as amended

MARITIME FUNCTIONS

PART I—FEDERAL MARITIME COMMISSION

SECTION 101. *Creation of Federal Maritime Commission.*—(a) There is hereby established a Federal Maritime Commission, hereinafter referred to as the Commission.

(b) The Commission shall not be a part of any executive department or under the authority of the head of any executive department.

SEC. 102. *Composition of the Commission.*—(a) The Commission shall be composed of five Commissioners, who shall be appointed by the President by and with the advice and consent of the Senate. Each Commissioner shall be removable by the President for inefficiency, neglect of duty, or malfeasance in office.

(b) The President shall from time to time designate one of the Commissioners to be the Chairman of the Commission.

(c) Of the first five Commissioners appointed hereunder, one shall be appointed for a term expiring on June 30, 1962, one for a term expiring on June 30, 1963, one for a term expiring on June 30, 1964, and two for terms expiring on June 30, 1965. Their successors shall be appointed for terms of four years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he succeeds. Not more than three of the Commissioners shall be appointed from the same political party. A vacancy in the office of any such Commissioner shall be filled in the same manner as the original appointment. The Chairman of the Commission shall receive a salary at the rate of $20,500 per annum, and each of the other Commissioners shall receive a salary at the rate of $20,000 per annum.

(d) A vacancy in the Commission, so long as there shall be three Commissioners in office, shall not impair the power of the Commission to execute its functions. Any three of the Commissioners in office shall constitute a quorum for the transaction of the business of the Commission and the affirmative votes of any three Commissioners shall be sufficient for the disposition of any matter which may come before the Commission.

SEC. 103. *Transfer of functions to Commission.*—The following functions, which are now vested in the Federal Maritime Board under the provisions of Reorganization Plan No. 21 of 1950 (64 Stat. 1273), are hereby transferred from that Board to the Commission:

(a) All functions under the provisions of sections 14-20, inclusive, and sections 22-33, inclusive, of the Shipping Act, 1916, as amended (46 U.S.C. 812-819 and 821-832), including such functions with respect to the regulation and control of rates, services, practices, and agreements of common carriers by water and of other persons.

(b) All functions with respect to the regulation and control of rates, fares, charges, classifications, tariffs, regulations, and practices of common carriers by water under the provisions of the Intercoastal Shipping Act, 1933, as amended (46 U.S.C. 843-848).

(c) The functions with respect to the making of rules and regulations affecting shipping in the foreign trade to adjust or meet conditions unfavorable to such shipping, and with respect to the approval, suspension, modification, or annulment of rules or regulations of other Federal agencies affecting shipping in the foreign trade, under the provisions of section 19 of the Merchant Marine Act, 1920, as amended (46 U.S.C. 876), exclusive of subsection (1) (a) thereof.

(d) The functions with respect to investigating discriminatory rates, charges, classifications, and practices in the foreign trade, and with respect to recommending legislation to correct such discrimination, under the provisions of section 212(e) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1122(f)).

(e) To the extent that they relate to functions transferred to the Commission by the foregoing provisions of this section:

(1) The functions with respect to requiring the filing of reports, accounts, records, rates, charges, and memoranda, under the provisions of section 21 of the Shipping Act, 1916, as amended (46 U.S.C. 820).

(2) The functions with respect to adopting rules and regulations, making reports and recommendations to Congress, subpoenaing witnesses, administering oaths, taking evidence, and requiring the production of books, papers, and documents, under the provisions of sections 204, 208, and 214 of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1114, 1118, and 1124).

SEC. 104. *Transfer of functions to Chairman.*—There are hereby transferred to the Chairman of the Commission:

(a) The functions of the Chairman of the Federal Maritime Board, including his functions derived from the provisions of Reorganization Plan No. 6 of 1949, to the extent that they relate to the functions transferred to the Commission by the provisions of section 103 of this reorganization plan.

(b) The functions of the Secretary of Commerce to the extent that they are necessary for, or incidental to, the administration of the functions transferred to the Commission by the provisions of section 103 of this reorganization plan.

SEC. 105. *Authority to delegate.*—(a) The Commission shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business, or matter: *Provided, however,* That nothing herein contained shall be deemed to supersede the provisions of section 7(a) of the Administrative Procedure Act (60 Stat. 241), as amended.

(b) With respect to the delegation of any of its functions, as provided in subsection (a) of this section, the Commission shall retain a discretionary right to review the action of any such division of the Commission, individual Commissioner, hearing examiner, employee or employee board, upon its own initiative or upon petition of a party to or an intervenor in such action, within such time and in such manner as the Commission shall by rule prescribe: *Provided, however,* That the vote of a majority of the Commission less one member thereof shall

be sufficient to bring any such action before the Commission for review.

(c) Should the right to exercise such discretionary review be declined, or should no such review be sought within the time stated in the rules promulgated by the Commission, then the action of any such division of the Commission, individual Commissioner, hearing examiner, employee or employee board, shall, for all purposes, including appeal or review thereof, be deemed to be the action of the Commission.

(d) There are hereby transferred to the Chairman of the Commission the functions with respect to the assignment of Commission personnel, including Commissioners, to perform such functions as may have been delegated by the Commission to Commission personnel, including Commissioners, pursuant to the foregoing subsections of this section.

PART II—DEPARTMENT OF COMMERCE

SEC. 201. *Maritime Administrator.*—There shall be at the head of the Maritime Administration (established by the provisions of part II of Reorganization Plan 21 of 1950) a Maritime Administrator, hereinafter referred to as the Administrator. The Assistant Secretary of Commerce for Maritime Affairs shall, ex officio, to be Administrator. The Administrator shall perform such duties as the Secretary of Commerce shall prescribe.

SEC. 202. *Functions of Secretary of Commerce.*—(a) Except to the extent inconsistent with the provisions of sections 101(b) or 104(b) of this reorganization plan, there shall remain vested in the Secretary of Commerce all the functions conferred upon the Secretary by the provisions of Reorganization Plan No. 21 of 1950.

(b) There are hereby transferred to the Secretary of Commerce:

(1) All functions of the Federal Maritime Board under the provisions of section 105(1) to 105(3), inclusive, of Reorganization Plan No. 21 of 1950.

(2) Except to the extent transferred to the Commission by the provisions of section 103(e) of this reorganization plan, the functions described in the said section 103(e).

(3) Any other functions of the Federal Maritime Board not otherwise transferred by the provisions of Part I of this reorganization plan.

TITLE V—CONSTRUCTION-DIFFERENTIAL SUBSIDY

SEC. 501. (a) Any proposed ship purchaser who is a citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in the construction of a new vessel to be used in the foreign commerce of the United States. No such application shall be approved by the Secretary of Commerce unless he determines that (1) the plans and specifications call for a new vessel which will meet the requirements of the foreign commerce of the United States, will aid in the promotion and development of such commerce, and be suitable for use by the United States for national defense or military purposes in time of war or national emergency; (2) if the applicant is the proposed ship purchaser, the applicant possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the proposed new vessel, and (3) the granting of the aid applied for is reasonably calculated to carry out effectively the purposes and policy of this Act. The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price shall not restrict the lawful

or proper use or operation of the vessel except to the extent expressly required by law. The Secretary of Commerce may give preferred consideration to applications that will tend to reduce construction-differential subsidies and that propose the construction of ships of high transport capability and productivity.

(b) The Secretary of Commerce shall submit the plans and specifications for the proposed vessel to the Navy Department for examination thereof and suggestion for such changes therein as may be deemed necessary or proper in order that such vessel shall be suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency. If the Secretary of the Navy approves such plans and specifications as submitted, or as modified, in accordance with the provisions of this subsection, he shall certify such approval to the Secretary of Commerce.

(c) Any citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in reconstructing or reconditioning any vessel that is to be used in the foreign commerce of the United States. If the Secretary of Commerce, in the exercise of his discretion, shall determine that the granting of the financial aid applied for is reasonably calculated to carry out effectively the purposes and policy of this Act, the Secretary of Commerce may approve such application and enter into a contract or contracts with the applicant therefore providing for the payment by the United States of a construction-differential subsidy that is to be ascertained, determined, controlled, granted, and paid, subject to all the applicable conditions and limitations of this title and under such further conditions and limitations as may be prescribed in the rules and regulations the Secretary of Commerce has adopted as provided in

section 204(b) of this Act; but the financial aid authorized by this subsection shall be extended to reconstruction or reconditioning only in exceptional cases and after a thorough study and a formal determination by the Secretary of Commerce that the proposed reconstruction or reconditioning is consistent with the purposes and policy of this Act.

SEC. 502. (a) If the Secretary of the Navy certifies his approval under section 501(b) of this Act, and the Secretary of Commerce approves the application, he may secure bids for the construction of the proposed vessel according to the approved plans and specifications. If the bid of the shipbuilder who is the lowest responsible bidder is determined by the Secretary of Commerce to be fair and reasonable, the Secretary of Commerce may approve such bid, and if such approved bid is accepted by the proposed ship purchaser, the Secretary of Commerce is authorized to enter into a contract with the successful bidder for the construction, outfitting, and equipment of the proposed vessel, and for the payment by the Secretary of Commerce to the shipbuilder, on terms to be agreed upon in the contract, of the contract price of the vessel, out of the construction fund hereinbefore referred to, or out of other available funds. Notwithstanding the provisions of the first sentence of section 505 of this Act with respect to competitive bidding, the Secretary of Commerce is authorized, at any time prior to June 30, 1979, to accept a price for the construction of the ship which has been negotiated between a shipyard and a proposed ship purchaser if (1) the proposed ship purchaser and the shipyard submit backup cost details and evidence that the negotiated price is fair and reasonable; (2) the Secretary of Commerce finds that the negotiated price is fair and reasonable; and (3) the shipyard agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment have access

to and the right to examine any pertinent books, documents, papers, and records of the shipyard or any of its subcontractors related to the negotiation or performance of any contract or subcontract negotiated under this subsection and will include in its subcontracts a provision to that effect. Concurrently with entering into such contract with the shipbuilder, the Secretary of Commerce is authorized to enter into a contract for the sale of such vessel upon its completion, to the applicant if he is the proposed ship purchaser and if not to another citizen of the United States, if the Secretary of Commerce determines that such citizen possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the vessel at a price corresponding to the estimated cost, as determined by the Secretary of Commerce pursuant to the provisions of this Act, of building such vessel in a foreign shipyard.

(b) The amount of the reduction in selling price which is herein termed "construction differential subsidy" shall equal, but not exceed, the excess of the bid of the shipbuilder constructing the proposed vessel (excluding the cost of any features incorporated in the vessel for national defense uses, which shall be paid by the Secretary in addition to the subsidy), over the fair and reasonable estimate of cost, as determined by the Secretary, of the construction of that type vessel if it were constructed under similar plans and specifications (excluding national defense features as above provided) in a foreign shipbuilding center which is deemed by the Secretary to furnish a fair and representative example for the determination of the estimated foreign cost of construction of vessels of the type proposed to be constructed. The Secretary of Commerce shall recompute such estimated foreign cost annually unless, in the opinion of the Secretary, there has been a significant change in shipbuilding market conditions. The Secretary shall publish notice of his intention to compute or recompute such estimated

foreign cost and shall give interested persons, including but not limited to shipyards and shipowners and associations thereof, an opportunity to file written statements. The Secretary's consideration shall include, but not be limited to, all relevant matter so filed, and his determination shall include or be accompanied by a concise explanation of the basis of his determination. The construction differential approved and paid by the Secretary shall not exceed 50 per centum of the cost of constructing, reconstructing, or reconditioning the vessel (excluding the cost of national defense features). If the Secretary finds that the construction differential exceeds, in any case, the foregoing percentage of such cost, the Secretary may negotiate with any bidder (whether or not such person is the lowest bidder) and may contract with such bidder (notwithstanding the first sentence of section 505) for the construction, reconstruction, or reconditioning of the vessel involved in a domestic shipyard at a cost which will reduce the construction differential to such percentage or less.

In the event that the Secretary has reason to believe that the bidding in any instance is collusive, he shall report all of the evidence on which he acted (1) to the Attorney General of the United States, and (2) to the President of the Senate and to the Speaker of the House of Representatives if the Congress shall be in session or if the Congress shall not be in session, then to the Secretary of the Senate and Clerk of the House, respectively.

(c) In such contract of sale between the purchaser and the Secretary of Commerce, the purchaser shall be required to make cash payments to the Secretary of Commerce of not less than 25 per centum of the price at which the vessel is sold to the purchaser. The cash payments shall be made at the time and in the same proportion as provided for the payments on account of the construction cost in the contract between the ship-

builder and the Secretary of Commerce. The purchaser shall pay, not less frequently than annually, interest on those portions of the Secretary of Commerce's payments as made to the shipbuilder which are chargeable to the purchaser's portion of the price of the vessel (after deduction of the purchaser's cash payments) at a rate not less than (i) a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, adjusted to the nearest one-eighth of 1 per centum, plus (ii) an allowance adequate in the judgment of the Secretary of Commerce to cover administrative costs. The balance of such purchase price shall be paid by the purchaser within twenty-five years after delivery of the vessel and in not to exceed twenty-five equal annual installments, the first of which shall be payable one year after the delivery of the vessel by the Secretary of Commerce to the purchaser. Interest at the rate per annum applicable to payments that are chargeable to the purchaser's portion of the price of the vessel shall be paid on all such installments of the purchase price remaining unpaid.

(e) If no bids are received for the construction, outfitting, or equipping of such vessel, or if it appears to the Secretary of Commerce that the bids received from privately owned shipyards of the United States are collusive, excessive, or unreasonable, and if a citizen of the United States agrees to purchase said vessel as provided in this section, then, to provide employment for citizens of the United States, the Secretary of Commerce may have such vessel constructed, outfitted, or equipped at not in excess of the actual cost thereof in a navy yard of the United States under such regulations as may be promulgated by the Secretary of the Navy and the Secretary of Commerce. In such event the Secretary of Commerce is authorized to pay for any such vessel so

constructed from his construction fund. The Secretary of Commerce is authorized to sell any vessel so constructed, outfitted, or equipped in a navy yard to a citizen of the United States for the fair and reasonable value thereof, but at not less than the cost thereof less the equivalent to the construction-differential subsidy determined as provided by subsection (b), such sale to be in accordance with all the provisions of this title.

(f) The Secretary of Commerce, with the advice of and in coordination with the Secretary of the Navy, shall, at least once each year, as required for purposes of this Act, survey the existing privately owned shipyards capable of merchant ship construction, or review available data on such shipyards if deemed adequate, to determine whether their capabilities for merchant ship construction, including facilities and skilled personnel, provide an adequate mobilization base at strategic points for purposes of national defense and national emergency. The Secretary of Commerce, in connection with ship construction, reconstruction, reconditioning, or remodeling under title V and VII, upon a basis of a finding that the award of the proposed construction, reconstruction, reconditioning, or remodeling work will remedy an existing or impending inadequacy in such mobilization base as to the capabilities and capacities of a shipyard or shipyards at a strategic point, and after taking into consideration the benefits accruing from standardized construction, the conditions of unemployment, and the needs and reasonable requirements of all shipyards, may allocate such construction, reconstruction, reconditioning, or remodeling to such yard or yards in such manner as he may determine to be fair, just, and reasonable to all sections of the country, subject to the provisions of this subsection. In the allocation of construction work to such yards as herein provided, the Secretary of Commerce may, after first obtaining competitive bids for such work in compliance with the provisions of this Act, negotiate with the

bidders and with other shipbuilders concerning the terms and conditions of any contract for such work, and is authorized to enter into such contract at a price deemed by the Secretary of Commerce to be fair and reasonable. Any contract entered into by the Secretary of Commerce under the provisions of this subsection shall be subject to all of the terms and conditions of this Act, excepting those pertaining to the awarding of contracts to the lowest bidder which are inconsistent with the provisions of this subsection. In the event that a contract is made providing for a price in excess of the lowest responsible bid which otherwise would be accepted, such excess shall be paid by the Secretary of Commerce as a part of the cost of national defense, and shall not be considered as a part of the construction-differential subsidy. In the event that a contract is made providing for a price lower than the lowest responsible bid which otherwise would be accepted, the construction-differential subsidy shall be computed on the contract price in lieu of such bid.

If, as a result of allocation under this subsection, the purchaser incurs expenses for inspection and supervision of the vessel during construction and for the delivery voyage of the vessel in excess of the estimated expenses for the same services that he would have incurred if the vessel had been constructed by the lowest responsible bidder the Secretary of Commerce (with respect to construction under title V, except section 509) shall reimburse the purchaser for such excess, less one-half of any gross income the purchaser receives that is allocable to the delivery voyage minus one-half of the extra expenses incurred to produce such gross income, and such reimbursement shall not be considered part of the construction-differential subsidy: *Provided*, That no interest shall be paid on any refund authorized under this Act. If the vessel is constructed under section 509 the Secretary of Commerce shall reduce the price of the vessel by such excess, less one-half of any gross income (minus

one-half of the extra expenses incurred to produce such gross income) the purchaser receives that is allocable to the delivery voyage. In the case of a vessel that is not to receive operating-differential subsidy, the delivery voyage shall be deemed terminated at the port where the vessel begins loading. In the case of a vessel that is to receive operating-differential subsidy, the delivery voyage shall be deemed terminated when the vessel begins loading at a United States port in an essential service. In either case, however, the vessel owner shall not be compensated for excess vessel delivery costs in an amount greater than the expenses that would have been incurred in delivering the vessel from the shipyard at which it was built to the shipyard of the lowest responsible bidder. If as a result of such allocation, the expenses the purchaser incurs with respect to such services are less than the expenses he would have incurred for such services if the vessel had been constructed by the lowest responsible bidder, the purchaser shall pay to the Secretary of Commerce an amount equal to such reduction and, if the vessel was built with the aid of construction-differential subsidy, such payment shall not be considered a reduction of the construction-differential subsidy.

(g) Upon the application of any citizen of the United States to purchase any vessel acquired by the Secretary of Commerce under the provisions of section 215, the Secretary of Commerce is authorized to sell such vessel to the applicant for the fair and reasonable value thereof, but at not less than the cost thereof to the Secretary of Commerce, less depreciation at the rate of 4 per centum per annum from the date of completion, excluding the cost of national-defense features added by the Secretary of Commerce, less the equivalent of any applicable construction-differential subsidy as provided by subsection (b), such sale to be in accordance with all the provisions of this title. Such vessel shall thereupon be eligible for an operating-differential subsidy under title VI of this

Act, notwithstanding the provisions of section 601(a)(1), and section 610(1), or any other provision of law.

SEC. 504. If a qualified purchaser under the terms of this title desires to purchase a vessel to be constructed in accordance with an application for construction-differential subsidy under this title, the Secretary of Commerce may, in lieu of contracting to pay the entire cost of the vessel under section 502, contract to pay only construction-differential subsidy and the cost of national defense features to the shipyard constructing such vessel. The construction-differential subsidy and payments for the cost of national defense features shall be based upon the lowest responsible domestic bid unless the vessel is constructed at a negotiated price as provided by section 502(a) or under a contract negotiated by the Secretary of Commerce as provided in section 502(b) in which event the construction-differential subsidy and payments for the cost of national defense features shall be based upon such negotiated price. No construction-differential subsidy, as provided in this section, shall be paid unless the said contract or contracts or other arrangements contain such provisions as are provided in this title to protect the interests of the United States as the Secretary of Commerce deems necessary. Such vessel shall be documented under the laws of the United States as provided in section 503 of this title. The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the lawful or proper use or operation of the vessel, except to the extent expressly required by law.

SEC. 506. Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic

coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Commission that proportion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Commission may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Commission may determine that such transfer is necessary or appropriate to carry out the purposes of this Act. Such consent shall be conditioned upon the agreement by the owner to pay to the Commission, upon such terms and conditions as it may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Commission as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

SEC. 1104. (a) Pursuant to the authority granted under section 1103(a), the Secretary of Commerce, upon such terms as he shall prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in—

(1) financing, including reimbursement of an obligor for expenditures previously made for, construction, reconstruction, or reconditioning of a vessel or vessels owned by citizens of the United States which are designed principally for research, or for commercial use (A) in the coastwise or intercoastal

trade; (B) on the Great Lakes, or on bays, sounds, rivers, harbors, or inland lakes of the United States; (C) in foreign trade as defined in section 905 of this Act for purposes of title V of this Act; (D) in the fishing trade or industry; or (E) with respect to floating drydocks in the construction, reconstruction, reconditioning, or repair of vessels: *Provided, however,* That no guarantee shall be entered into pursuant to this paragraph (a)(1) later than one year after delivery, or redelivery in the case of reconstruction or reconditioning of any such vessel unless the proceeds of the obligation are used to finance the construction, reconstruction, or reconditioning of a vessel or vessels, or facilities or equipment pertaining to marine operations;

(2) financing the purchase of vessels theretofore acquired by the Fund under the provisions of section 1105 and reconditioning and reconstructing such vessels;

(3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act, as amended; or

(4) refinancing existing obligations issued for one of the purposes specified in (1), (2), or (3) whether or not guaranteed under this title, including, but not limited to, short-term obligations incurred for the purpose of obtaining temporary funds with the view to refinancing from time to time.

(b) Obligations guaranteed under this title—

(1) shall have an obligor approved by the Secretary of Commerce as responsible and possessing the ability, experience, financial resources, and other qualifications necessary to the adequate operation and maintenance of the vessel or vessels which serve as security for the guarantee of the Secretary of Commerce;